Alaska Workers' Compensation Appeals Commission

Sourdough Express, Inc., and Alaska National Insurance Co.,
Appellants,

vs.

Darrell Barron,
Appellee.

Memorandum Decision and Order
Decision No. 069 February 7, 2008

AWCAC Appeal No. 06-036
AWCB Decision No. 06-0304
AWCB Case No. 199802868M

Appeal from Alaska Workers' Compensation Board Decision No. 06-0304, issued by the northern panel at Fairbanks on November 15, 2006, Fred G. Brown, Chair, Chris Johansen, Member for Industry, Damian Thomas, Member for Labor.

Appearances: Richard Wagg, Russell, Wagg, Gabbert & Budzinski, for appellants Sourdough Express, Inc., and Alaska National Insurance Co. Allen F. Vacura, Stepovich & Vacura, for appellee, Darrell Barron.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

This is an appeal[1] from a decision denying the employer's petition to dismiss a claim for certain medical benefits because the post-claim controversion filed in 1999 was invalid, thus not starting the two-year period to file a request for hearing, and to dismiss a 2004 claim for a latent injury discovered in 2005. We conclude that a controversion filed in bad faith is a legal defense to the two-year time-bar period in AS 23.30.110(c), but that the board failed to make findings of fact sufficient to support a conclusion that the employer's controversion of the employee's claim was filed in bad faith. We remand for additional findings and action by the board. We conclude that a

[1] We heard this appeal upon grant of the appellants' motion for extraordinary review. *Sourdough Express, Inc. v. Barron,* Alaska Workers' Comp. App. Comm'n Dec. No. 028 (Jan. 17, 2007).

work-related aggravation of a progressive condition may result in a latent injury. In this case, the full extent of the injury (described as a disc protrusion & annular tear) was not discovered until *after* the 2004 claim was filed. However, the employee's claim was amended by the board to conform to the evidence after the discovery of the injury. In the absence of evidence of prejudice to the employer, amendment of a claim to conform to the evidence was within the discretion of the board. In this instance, we interpret the board's decision to mean that the employee made a claim of latent injury and that the board did not make a finding of fact, without a hearing on the merits, that the injury claimed by the employee was a work-related latent injury. We caution that the relevant inquiry in deciding the merits of the claim is still whether the employee's work, which ended in 1998, was a substantial factor in bringing about the newly discovered injury, notwithstanding the intervening years. We remand to the board for further proceedings on the employee's claim.

1. Factual background.

This case has a long history and the facts are disputed. This appeal is limited to review of the denial of a petition to dismiss certain claims based on the statute of limitations and operation of AS 23.30.110(c); our review does not decide the merits of the employee's claims. Therefore, our discussion of the facts is very limited and solely provided to place our legal analysis in context.

Darrell Barron has a history of back pain associated with back strains when he was working in 1989. He worked for Sourdough Express, Inc., as a truck driver and mover from 1991 to April 1998, except for a period in 1995. After he left Sourdough Express, he began his own photography business, a sole proprietorship.[2]

Barron alleges that he suffered a number of back injuries while working as a mover and truck driver. He did not file timely written report of injury on all these injuries, although he claims he told his employer about them. One of these injuries was

[2] AS 23.30.239 permits a person who is a sole proprietor to elect coverage as an employee under the workers' compensation act.

on June 2, 1994, when he fell stepping backwards on Ft. Wainwright.[3] He continued to work. Later in November 1994, he injured his lower back playing with his son.[4] He also filed a report of injury[5] to his right trapezius muscle November 29, 1994.[6] He quit his employment in 1995. He testified in an earlier proceeding that he quit in part to take care of his back.

After he returned to work for Sourdough Express July 1, 1996, he filed a report of injury for July 16, 1997, when he hurt his neck and back muscles wrapping a chair.[7] This report also included an injury on July 11, 1997, also to his neck and back, while moving a desk. He filed a report of injury to his lower back and right ankle on February 18, 1998, while moving a hide-a-bed couch.[8] The employer paid temporary total disability compensation on this injury from February 22 through March 8, 1998.[9] On March 13, 1998, Barron reported he injured his right hand.[10] He was paid compensation for this injury from March 16, 1998 through April 2, 1998.[11] He stopped working April 13, 1998. Barron claims his unemployment was caused by his back pain and his hand injury, although the employer's comment to the notice of injury filed in 2001 states that Barron "left our employment as a disgruntled employee."[12]

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[3] R. 0014. The injury was reported to the board on May 14, 2001.

[4] Barron Depo. I, 51:8-18.

[5] When we use the phrase "filed a report of injury," we mean that the employee signed a written report of occupational injury or illness on a form approved by the board and gave it to the employer and that a copy or original of the report was filed with the workers' compensation division.

[6] R. 0001.

[7] R. 0002.

[8] R. 0005. The employer's insurer filed a notice of controversion on February 1, 1999, stating "no medical evidence has been presented to support relationship of current condition with work injury of 02/18/98." R. 0009.

[9] R. 0008. The employer subsequently controverted excessive chiropractic treatment on March 24, 1998. R. 0010.

[10] R. 0007.

[11] R. 0011.

[12] R. 0015. The statements are not mutually exclusive.

2. Proceedings before the board.

On November 2, 1999, Barron, through Peter Stepovich of the "Workers' Compensation Consultants of Alaska," filed a claim for benefits for his February 18, 1998, injury, case number 199802868.[13] The claim stated the nature of the injury as "L4-5 disc desiccation and mild diffuse bulge."[14] It requested the following benefits: temporary total disability compensation from May 1998 through September 1998 and from April 1999 through "present," temporary partial disability from October 1998 through March 1999, permanent partial disability compensation, medical costs, transportation costs, a penalty for a late-filed controversion, interest and attorney fees.[15]

The employer controverted the claim on November 24, 1999.[16] The controversion listed the specific benefits referred to in the claim, and listed six reasons the benefits claimed were controverted:

> Work is not a legal cause of employee's disability, if any.
>
> Employee's injury stems from a long-standing preexisting condition.
>
> Employee's work is not a substantial factor in his injury or disability, if any.
>
> Employee originally treated at Chief Andrew Isaac Health Center on 2/19/98. He then saw Chiropractor Steven Kunz on 2/23/98. Employee saw Dr. Mark Wade on 10/08/98 and then resumed treatment at Chief Andrew Isaac Health Center in 12/98. Pursuant to AS 23.30.095(a), employee has already had more than one change in his designation of a treating physician.
>
> Employee was released for work 03/09/98. Employee returned to work 03/10/98. Employee voluntarily resigned from work on 4/13/98.

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13 R. 0030-31.

14 R. 0030.

15 R. 0031.

16 R. 0013.

> Employee has received unemployment insurance benefits since 02/18/98. He is not entitled to compensation benefits during any period of time he received unemployment benefits.
>
> No PPI rating assessed at this time.[17]

An answer to the claim was also filed.[18] The record contains no summaries of pre-hearing conferences on this claim in 1999, 2000 or 2001. Other than a request for cross-examination filed in February 2000,[19] there is no indication in the board record that Mr. Stepovich took *any* steps to move his client's case toward resolution between November 2, 1999 and November 2, 2001.[20]

On May 17, 2001, Barron filed another claim, this time for his June 2, 1994, injury to his lower back on Ft. Wainwright, case number 199430330.[21] The part of the body injured was "lower back." He listed Spaulding Chiropractic Clinic as his attending physician. He listed "Pete Stepovich" as his attorney.[22] The reason he gave for filing his claim was that he was "not getting help needed to move on."[23] This claim was controverted by Sourdough Express on July 19, 2001, listing, among other reasons, that the claim was barred under AS 23.30.100, AS 23.30.105 and laches.[24] Before the

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[17] *Id*.

[18] R. 0034-35.

[19] R. 0037.

[20] The board's record contains no medical summary, which should have been filed by Mr. Stepovich with the claim. 8 AAC 45.052(a). The board's record in case number 199802868 was so inactive that it apparently was archived to microfiche and recopied after the 2004 claim was filed; more material may be on microfiche or in another file.

[21] R. 0038-39.

[22] Peter J. Stepovich is not an attorney, but has represented employees as a paralegal under supervision of an attorney, and was Barron's representative in case number 199802868.

[23] R. 0038.

[24] R. 0017. Laches is an affirmative defense based in equity that forecloses a claimant from pursuing a too long neglected right. To raise this defense, the defendant must show "(1) that the [claimant] has unreasonably delayed in bringing the [claim], and (2) that this unreasonable delay has caused undue harm or prejudice to the defendant." *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 729 (Alaska 2000). Laches

controversion was filed, the employer answered the claim on July 13, 2001, also asserting the claim was barred under AS 23.30.100, AS 23.30.105 and laches, as well as that the injury was not the legal cause of the claimed disability.[25]

Barron attended a pre-hearing conference on August 1, 2001 on case number 199430330. The pre-hearing officer recorded that

> Mr. Barron indicated that he has been attempting to get in touch with Pete Stepovich regarding representation, but has not been successful in doing so. He wishes to move forward with the claim.[26]

On September 19, 2001, the employee's deposition was taken.[27] The employer's statutes of limitation defenses were set for hearing by the workers' compensation officer in a second pre-hearing conference on September 27, 2001, with the agreement of the parties.[28]

On November 29, 2001, the board heard the "petition to dismiss" the 2001 claim, although it noted that the "February 18, 1998 injury resulted in a separate claim, and is in the process of litigation."[29] The board's decision primarily addressed whether Barron's delay in filing a written notice of injury barred the claim under AS 23.30.100(d). The board, relying on Barron's testimony that he quit in 1995 to take

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is a defense to an action in equity, not in law, *Id.* at 730. It is not available as a defense to enforcement of the workers' compensation statutes; *Wausau Ins. Companies v. Van Biene*, 847 P.2d 584, 589 n.15 (Alaska 1993) (not discussing whether laches is a defense to the "equitable" extension of statutes of limitations).

[25] R. 0044-46.

[26] R. 0740.

[27] R. 0050. The caption of the notice of deposition lists case number 199802868 (the 1999 claim) instead of the case number for the 2001 claim.

[28] R. 0744.

[29] *Darrell D. Barron v. Sourdough Express Inc.*, Alaska Workers' Comp. Bd. Dec. No. 01-0249, 2 (December 14, 2001) (W. Walters). The decision did not indicate the status of that litigation. Evidently, the reference is to the claim filed November 2, 1999, (R. 0030-31) controverted November 24, 1999, (R. 0013) but for which no affidavit of readiness for hearing had been filed by November 29, 2001, when the 2001 claim was heard.

care of his back injury and that he recalled the injury after getting his health records in 1998, found that he had knowledge of the injury and the nature of his injury by 1998, but did not file a written notice of the injury until May 22, 2001, "long past the 30-day time limit."[30] The board rejected Barron's argument that Sourdough Express was not prejudiced by the delay, finding that "the employer in this case would have been in a better position to investigate the claim with earlier reporting."[31] The board dismissed Barron's claim in case number 199430330 based on AS 23.30.100.

Barron sought reconsideration, based on claims that his attorney should have obtained documents to substantiate his claim and that Sourdough Express destroyed evidence of his report of injury.[32] His request for reconsideration was filed within 15 days of the board's decision,[33] but the board "closed the record to consider this petition when we next met, January 17, 2002. Because it is now more than 30 days after our

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30 *Darrell D. Barron*, Dec. No. 01-0249 at 4-5.

31 *Darrell D. Barron*, Dec. No. 01-0249 at 5.

32 *Darrell D. Barron v. Sourdough Express, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 02-0016, 3 (January 29, 2002) (W. Walters). Barron's request for reconsideration, R. 0790, includes this statement: "Also, when [I] talk[ed] to Pete Stepovich in 1998 I . . . asked Pete Stepovich to obtain dispatch records to clarify my story, and if he was doing his job, we could see . . . if the records (dispatch) would have had the records showing the information I believe . . . was necessary to my case." R. 0709. Barron also testified that:

> I tried for three years or probably two and a half years, ever since I got Pete Stepovich as a lawyer, to get hold of the dispatch books. . . . I had told my lawyer that I needed those books . . . . And he wrote it down, la da da, you know. And watching TV, you know, any time you tell a lawyer on TV, you know, get these, get that, they go out and they get them, you know. . . . and that's what I thought was going on. And a year had passed. And I had tried – I got hold of him to try to get hold of these books. And I couldn't get hold of him. It's so hard to get ahold of Pete.

Barron Depo. I 71:3 – 72:1.

33 AS 44.62.540(a).

December 14, 2001 decision, we have lost our authority to reconsider the decision."[34] Even if it could have exercised discretion to reconsider, the board said, "we would have affirmed the decision."[35]

On November 10, 2004, Barron, again through Workers' Compensation Consultants of Alaska,[36] filed another claim, again listing case numbers 199430330 and 199802868, with six other case numbers, associated with other dates of injury between December 12, 1994 and March 20, 1998.[37] The claim described how the injury to his "Lower back, neck, ankle, and hand, leg and knee pain and shoulder" happened: "Cumulative injury mainly to my back when I was employed by Sourdough. The work was very physically demanding and required heavy lifting on a frequent basis. I injured myself on numerous occasions, some I filed Notice of Injury on and other I just kept working."[38] Barron stated the nature of the injury as "L4-5 disc desiccation and mild diffuse bulge. Recent MRI's have shown progressive disc protrusion of L4-5."[39] The claim was for medical benefits, temporary total compensation from May 1998 through September 1998 and from April 1999 through "non-TPD dates," and for temporary partial disability compensation from October 1998 through March 1999 and in November 2004.[40] He also requested permanent partial disability compensation "once rated."[41]

Sourdough Express answered the claim,[42] and filed a petition to dismiss on statute of limitations grounds in December 2004.[43] It filed an affidavit of readiness to

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34 *Darrell D. Barron,* Dec. No. 02-0016 at 4.

35 *Id.*

36 R. 0078. Peter Stepovich's signature appears on the claim.

37 R. 0077-79.

38 R. 0077.

39 *Id.*

40 R. 0078.

41 *Id.*

42 R. 0080-82.

proceed on October 28, 2005.[44] At a pre-hearing conference in December 2005, a year after the claim was filed, the pre-hearing officer recognized that claims in the individual cases would be joined after they were filed, and the parties agreed that the petition would not then be set for hearing.[45] Barron filed individual claims in January 2006,[46] and Sourdough Express filed individual controversions of the claims[47] and answers.[48] The petition to dismiss was renewed on March 6, 2006,[49] and, after a pre-hearing conference in which all claims were joined under case number 199802868,[50] the petition to dismiss was heard May 31, 2006.

3. The board's decision.

The board's decision addressed whether the employee's June 2, 1994, or February 18, 1998, or numerous other claims are barred by the statutes of limitation, AS 23.30.100 and AS 23.30.105, the time-bar in AS 23.30.110(c), or laches.[51] The decision

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[43] A copy of the petition could not be found in the record. The board refers to it, *Darrell D. Barron v. Sourdough Express,* Alaska Workers' Comp. Bd. Dec. No. 06-0304, 8 (November 15, 2006) (F. Brown), and other board records refer to it, R. 0083, R. 0750.

[44] R. 0083.

[45] R. 0750-51.

[46] R. 00112-23.

[47] R. 0019-27.

[48] R. 0144-75.

[49] R. 0178-79.

[50] R. 0761.

[51] *Darrell D. Barron v. Sourdough Express,* Alaska Workers' Comp. Bd. Dec. No. 06-0304 (November 15, 2006) (F. Brown). The Alaska Supreme Court's ruling that an injury is latent if, in the exercise of reasonable diligence a claimant would not have come to know of the injury's existence, reflects the concern that the claimant not sleep on his rights, but exercise "reasonable diligence (taking into account his education, intelligence, and experience)." *Aleck v. Delvo Plastics, Inc.,* 972 P.2d 988, 991 (Alaska 1999). AS 23.30.120(b) provides that, if the board excuses the delay in giving notice of injury under AS 23.30.100(d)(2), the employee does not enjoy the presumption of compensability, which moderates the impact of the employer's lost opportunity to investigate or mitigate an injury and leaves the employer and claimant equally disadvantaged in proving, or refuting, the claim.

summarizes the course of Barron's medical treatment, including what Barron testified was a dramatic change in his back condition in December 2003, and the discovery, in December 2003, of a left sided disc protrusion at the L4-5, and, in February 2005 (after the November 2004 claim was filed) of a disc protrusion and grade 3 annular tear at the same site.[52] While the board does not relate in similar detail the course of litigation between filing the 1999 claim, the 2001 dismissal of the 2001 claim, and filing the 2004 claim, it summarizes the claims and the parties' arguments at the hearing.[53]

The board first found that the employee's claims[54] were not barred by AS 23.30.100 for failure to give notice of injury based on the finding that Barron testified he told his supervisors about his injuries[55] and "although one of the supervisors has passed away since the time the employee worked for the employer, . . . the employer has not been prejudiced by any delay in reporting [Barron's] injuries."[56] The board then considered whether AS 23.30.105 barred Barron's claims for disability compensation.[57] The board found that Sourdough paid compensation to Barron for "his

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[52] *Darrell D. Barron,* Dec. No. 06-0304 at 2-7.

[53] *Id.* at 7-8.

[54] The board panel did not differentiate the "claims" the employee filed in its discussion. However, among the "claims" the board evidently considered the claim based on an injury on June 2, 1994, case number 199430330. This claim was dismissed in 2001 and not appealed. The action of one panel is the action of the entire board. The time for modification of the board's decision had long since passed, including modification based on the concept of a new theory of how the event resulted in the injury, such as "cumulative injury." This is merely another theory of the same injury; that the event, while not a substantial factor in itself in bringing about the disability, combined with other work-related injuries to bring about the disability.

[55] The board relied as well on Dan Magoun's testimony that he was aware of the June 2, 1994 injury. *Darrell D. Barron*, Dec. No. 06-0304 at 9. The claim based on that injury was dismissed and the time for modification has passed, so Magoun's testimony cannot operate to revive a claim based on that injury. However, Magoun's testimony may be used to corroborate Barron's testimony that he usually told his supervisors about his injuries.

[56] *Darrell D. Barron*, Dec. No. 06-0304 at 9.

[57] *Id.* at 10.

injuries" on March 17, 1998.[58] The board found that Barron's claims, unless filed before March 17, 2000, were "time-barred unless latent."[59]

After reviewing *Grasle Co. v. Alaska Workmen's Comp. Bd.,*[60] *Fox v. Alascom, Inc.,*[61] *Dafermo v. Municipality of Anchorage*,[62] and *Aleck v. Delvo Plastics, Inc.*,[63] the board compared Barron's situation to Dafermo's and Aleck's. The board found, however, that Barron "had chargeable knowledge of his disabilities associated with his muscle strain, and its relationship to his employment. Given that he did not file within two years of his awareness, we find his claim for time-loss compensation benefits associated with degenerative disc disease and muscle strain may be denied."[64]

The board went on to find that "any compensation claims associated with the newly discovered L4-5 disc protrusion found on December 23, 2003 and the later discovered disc tear are not barred."[65] The board rejected Sourdough Express's argument that medical benefits claims were barred by laches or AS 23.30.105(a): "As discussed below, we find the employee's disc tear was latent, and that he had informed the employer of all that he knew. Therefore, we find the employee's medical claims are not dismissed on the basis of AS 23.30.105(a) or laches."[66]

The board found that the November 24, 1999, claim for compensation, insofar as it was not for the disc protrusion and annular tear, was dismissed under AS 23.30.105. However, the 1999 claim for medical benefits was not dismissed because the

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[58] *Id.* The payment for the period ending March 8, 1998, was made on March 17, 1998. R. 0008.

[59] *Darrell D. Barron,* Dec. No. 06-0304 at 10.

[60] 517 P.2d 999 (Alaska 1974).

[61] 783 P.2d 1154 (Alaska 1989).

[62] 941 P.2d 114 (Alaska 1997).

[63] 972 P.2d 988 (Alaska 1999).

[64] *Darrell D. Barron,* Dec. No. 06-0304 at 12.

[65] *Id.*

[66] *Id.*

controversion was "invalid." The record, the board held, "did not contain medical evidence to support a controversion at the time it was filed."[67]

Finally the board determined that the "disc protrusion" and "disc tear" were a latent condition that "may be work related." Sourdough Express's petition to dismiss any claims "associated with the employee's disc protrusion and disc tear"[68] were denied.[69]

4. Our standard of review.

When reviewing appeals from board decisions, the commission may not disturb credibility determinations by the workers' compensation board.[70] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings. Because the commission makes its decision based on the record before the board, the briefs filed on appeal, and oral argument to the commission,[71] no new evidence may be presented to the commission. Whether the evidence the board relied on is "substantial evidence," and whether the board applied the proper legal analysis to the facts, are matters of law to which we are required to apply our independent judgment.[72]

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67 *Id.* at 14.

68 The board uses the term disc tear; the medical reports refer to a tear in the annulus that holds the disc in place, not the disc itself. We use the term "annular tear" as it is more precise.

69 *Id.*

70 AS 23.30.128(b). The board made no explicit credibility determinations in this case, notwithstanding its citation to specific testimony at several points in its decision. When the board does not make a finding that a witness who appeared before it was, or was not, credible, we assume that the credibility of the witness was not important in reaching a decision.

71 AS 23.30.128(a).

72 AS 23.30.128(b).

5. Discussion.

The defendant employer moved for extraordinary review of the board's decision. In *Sourdough Express v. Barron,* Alaska Workers' Comp. App. Comm'n Dec. No. 028 (January 17, 2006), we stated

> The Alaska Supreme Court has held that "an injury is latent so long as the claimant does not know, and in the exercise of reasonable diligence (taking into account his education, intelligence and experience) would not have come to know, the nature of his disability and its relation to his employment." The court has not, however, considered the question of "how a change in condition may be distinguished from a latent injury." Thus, the question of how to distinguish a new injury from a latent injury remains unresolved.[73]

We also stated:

> AS 23.30.110(c) does not explicitly limit the applicability of the two year time limit to request a hearing to valid controversions. However, in *Bailey v. Texas Instruments, Inc.*, the Alaska Supreme Court appeared to suggest, in dicta, that an invalid controversion might make AS 23.30.110(c)'s time limit inapplicable. Thus, this question too remains unresolved.[74]

We granted the motion for extraordinary review, to allow an appeal

> on whether the board used the appropriate legal analysis for latent injury or new injury; and application of 110(c) . . . on the application of *Harp* reasoning to a controversion under 110(c) in light of the court's dicta in *Bailey v. Texas Instruments*, 111 P.3d 321, 325, n. 10, and whether the board made sufficient findings of fact to support its conclusion.[75]

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[73] *Sourdough Express v. Barron,* Alaska Workers' Comp. App. Comm'n Dec. No. 028, 5 (January 17, 2006) (citations omitted).

[74] *Id.* at 6-7 (citations omitted).

[75] *Id.* The commission referred to the following portion of the Supreme Court's note in *Bailey v. Texas Instruments*, 111 P.3d, 321, 325 n.10 (Alaska 2005):

> (b) Bailey argues that AS 23.30.110(c) violates his rights to substantive due process and equal protection. Both claims are premised on his assertion that requiring employees to prosecute their claims within a specified time frame is arbitrary, serves no rational purpose, and arbitrarily discriminates against claimants. We see no merit in these assertions. The law commonly imposes

On appeal, Sourdough argues that the board should have dismissed the 1999 claim for medical benefits. It argued, much as it did to the board, that AS 23.30.110(c) does not require a "valid" controversion to start the two-year time-bar. Instead, the Court's *dicta* in *Bailey v. Texas Instruments*,[76] "suggests the opposite: once any 'formal controversion' is filed, irrespective of whether there is a good faith basis, it is the employee's burden to prosecute the claim."[77] No authority was advanced in support of this reading of the statute. Sourdough also argues that the board's finding of an absence of substantial evidence to support the controversion was not itself supported by substantial evidence.

Barron argues that the board's finding of an invalid controversion is correct because "there must be 'reliance by the insurer on responsible medical opinion or conflicting medical testimony' to support a controversion."[78] Barron argues that it was "really immaterial as to when the Board found the employer's controversion to be in bad faith. . . . [I]f a controversion is inherently based on insufficient evidence then it is

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> a burden of proceeding on a claimant. Here Bailey is the claimant. Under Alaska's workers' compensation laws, when an employee files a claim, the employer is required to controvert or pay. AS 23.30.095(l) & (m). If the employer fails to pay or controvert, it loses its right to controvert and may be subject to a penalty. AS 23.30.155(c), (e), & (f). Moreover, the employer may not controvert the employee's claim without having a good faith basis to do so. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). Once an employer controverts a claim, the burden shifts to the employee to prosecute the claim promptly. When viewed as a whole, these requirements are rational because they promote the core purpose of the workers' compensation act: to establish a quick, efficient, and fair system for resolving disputes. Ch. 79, § 1, SLA 1988. In the context of the system as a whole, it is hardly unreasonable to impose the burden of proceeding on a claimant after the employer has filed a formal controversion.

[76] 111 P.3d at 325 n.10.

[77] Appellant's Appeal Br. 11-12.

[78] Appellee's Appeal Br. 7, *quoting Williams v. Abood,* 53 P.3d 134, 146 (Alaska 2002).

invalid at the time it is prepared and filed."[79] Barron also argues that there was "no credible evidence to support" the allegation of excessive change of physicians; even if there were, the board has found it has the authority to relax the "one-change rule" of AS 23.30.095(a).[80] Barron argues that until an employer medical examination was performed in January 2000, the employer did not have sufficient evidence to controvert the employee's claim.[81]

Sourdough Express argues that the board failed to apply the latency test set out in *Egemo v. Egemo Constr. Co.,*[82] and *Aleck v. Delvo Plastics, Inc*.[83] While acknowledging that the disc tear was not discovered until 2005, Sourdough Express argues that late discovery does not support a finding of latency. Sourdough Express argues that the tear was found after Barron filed the 2004 claim so it cannot logically support a claim of an injury latent until some point within two years preceding the claim. It argues that the tear is the culmination of a progressive degenerative condition Barron was well aware he had (degenerative disc disease and a disc bulge at the L4-5) and that Barron had related to his employment. The previous experience of his workers' compensation claim, denied in 2001, should have made him particularly sensitive to filing his claims on time, instead of waiting 6 years to file a claim in 2004.

Based on his reading of *Egemo,* Barron argues that it is not important that there be a "strong latency component to the claim," but that any new medical treatment "allows a claimant to basically file a new claim." Barron also argues that "the employer presented no new evidence to overcome the presumption that [the] injuries were work-related." He argues that the latency aspect, a sudden and severe change after almost two years of no treatment, is not rebutted.[84]

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79 *Id.*

80 Id. at 9.

81 Id. at 10.

82 998 P.2d 434 (Alaska 2000).

83 972 P.2d 988, 991 (Alaska 1999).

84 Appellee Br. 10-11.

The board's failure to separate and clearly identify issues related to the 1999 claim, the 2001 claim, and the new claims asserted in 2004 makes our review more difficult than it need be. The board used "claims" in a general sense, lumping the ankle injury in with the smashed hand and all of them in with back and neck injuries. Notwithstanding the recent assertion of a "cumulative injury" to the lower back, for purposes of this decision, we are concerned with the claims submitted as written applications for benefits in 1999, 2001 and 2004.

We begin by recognizing that the board did not actually decide the merits of *any* claim. Therefore, appellee's discussion of whether the presumption was overcome is irrelevant. When the board examines whether a claim should be dismissed on statute of limitations grounds, it does not examine whether there is *merit* to the claim for compensation or medical benefits; it only examines whether the employee has made a written claim, supported by some evidence, that survives the challenge raised the petition to dismiss. Thus, if the employer asserts that the claim is barred by AS 23.30.110(c), the board confines its decision to whether the employee filed a claim, i.e., "written application for benefits," whether the employer filed a controversion of the claim, and, if more than two years have passed from the date of the controversion, whether the evidence supports application of a legal excuse for failure to request a hearing within two years of the controversion. The *merits* of the claim are not before the board.

a. A controversion filed in bad faith does not start the time-bar of AS 23.30.110(c), but a controversion based on evidence later found insufficient to support denial is not necessarily filed in bad faith.

We begin with the board's findings regarding the defense asserted against the 1999 claim for benefits based on the time-bar in AS 23.30.110(c).[85] The board

[85] Although the board refers to the "claims" and "claim" in its discussion of the employer's petition to dismiss the 1999 claim based on the time-bar, the only written claim subject to AS 23.30.110(c) time-bar was the 1999 claim for medical benefits. The board refused to dismiss the claim for medical benefits as barred by the statute of limitations in AS 23.30.105, because that statute does not include medical

acknowledged, without specifically finding, that Barron had filed a written claim in November 1999 for his February 18, 1998 back injury through his attorney.[86] The board also noted that "the language of AS 23.30.110(c) is clear, requiring an employee to request a hearing within two years of the date of controversion, or face dismissal of the claim." The board made no finding that Barron's representative failed to file a request for hearing by November 2001 before addressing what excuse, if any, Barron's attorney had for the failure to file a timely request. Instead, the board apparently shifted the burden to Sourdough Express to prove that the controversion was "valid" before even *considering* whether a timely request for hearing was filed.

If, after the claim is filed, the employer files a controversion that is facially compliant with the act and the employee's attorney fails to file a request for hearing within two years, the employee is in the position of claiming a legal excuse from operation of AS 23.30.110(c). A party seeking to be excused from operation of law has the burden of producing evidence and persuading the board to excuse the failure. In this case, the board did not require Barron to show why he should be excused, as it did not even make a finding that the employee's attorney failed to file a request for hearing within two years of a facially valid controversion.

The board found that "the employee is correct, that the record did not contain medical evidence to support a controversion at the time it was filed." This statement reveals another board error. The question is not whether the *record* contained evidence that would support a controversion, but whether the *employer or its agents had in their possession or control evidence* that, standing alone and without weighing its credibility, would support a controversion of the claim when it was filed. The employer's controversion need not be based only on evidence contained in the board's record at the time the controversion is filed.

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benefits under AS 23.30.095(a) in the forms of compensation that may be barred. *Darrell D. Barron,* Dec. No. 06-0304 at 12. This ruling was not appealed.

[86] Although Barron represented himself in his 2001 claim, there is no evidence that his attorney withdrew from representation in the 1999 claim. Barron cannot be considered a self-represented litigant with respect to the 1999 claim.

Sourdough Express's controversion was based on a number of points. One of those points was that the injury was not the "legal cause" of the disability or need for medical treatment. At the time of the injury, in 1998, a work-related injury was the "legal cause" of disability or medical treatment if it was a substantial factor in bringing about the disability or need for medical treatment. Barron argues that Sourdough did not have such evidence when the controversion was filed because the employer's medical evaluation was not completed until almost two months after the controversion was filed. Barron argues, in essence, that an employer may not controvert a claim based on the lack of a work-relationship without a favorable employer medical evaluation.

Medical opinion evidence, when the issue concerns the medical relationship between the injury, disability, and the work, may be required to support a controversion. It is not *always* necessary to be sufficient to support a controversion, as appellee argues, and the board seems to have accepted. Evidence that a reasonable mind would rely on to support a conclusion is not confined to medical opinion evidence. Other evidence that either (1) affirmatively eliminates the reasonable possibility that the claimed need for treatment arose out of and in the course of employment, or (2) demonstrates an alternate cause that, if accepted, would eliminate the reasonable possibility that the claimed need for treatment is work-related, is sufficient to support a controversion. The board is not required to abandon its ability to rationally perceive and reason logically in deference to medical opinions.

Harp v. ARCO Alaska, Inc.,[87] did not go so far as to require an employer medical evaluation before every controversion; it held that there must be "sufficient evidence" to make a good faith controversion, and in Harp's case, that meant either responsible medical opinion *or* conflicting medical evidence.[88] Linda Harp, a security specialist in

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[87] 831 P.2d 352 (Alaska 1992).

[88] In *Williams v. Abood*, treatment notes indicating that the treatment was to the *right knee* due to a fall, but the claim was for a *left knee* injury at work was sufficient to controvert the treatment, without needing a medical opinion. 53 P.3d 134, 146 (Alaska 2002). Requiring medical opinion evidence in the form of an employer

the ARCO office building, had thoracic outlet surgery in June 1987, which was not related to her employment. She returned to work, and after a CPR class on July 29, 1987, reported right shoulder pain. She stopped working three weeks later. The insurer made about 10 months of temporary disability compensation payments before controverting payment on grounds that there was no medical authorization for continuing disability and that the July 1987 incident was only a temporary aggravation of the pre-existing condition.

The Supreme Court found that the evidence in the possession of the employer at the time of the controversion (absence of medical authorization of continuing disability) was "at best neutral evidence." Since the act does not *require* updates of condition, failure to provide one could not be used as evidence to support discontinuance of on-going disability compensation.[89] The employer also did not possess evidence that the disability was *not* work-related. One physician had reported he "was at a loss" to understand the source of her recurrent symptoms, but as he had previously concluded the disability was work related, the Court found, "it is unlikely [he] was questioning the work-relatedness of her injury."[90]

Harp's case turned on whether she was entitled to on-going disability compensation because medical opinion supported her continuing disability and its relationship to the CPR incident. Barron, on the other hand, had been released to return to work – and in fact returned to work – after his February 1998 injury, held himself out as able to work in order to collect unemployment insurance benefits later in 1998, had reported he "slipped a disc" years earlier, continued to report the slipped disc as the source of his back pain to his physicians, and sought treatment due to onset of

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medical evaluation to support every controversion, regardless of circumstances, contributes to the high cost of claims litigation by forcing claims into medical dispute and delays the resolution of claims that may be decided without resort to dueling medical opinions.

[89] 831 P.2d at 358. Harp was injured in 1987, so the 1988 amendments establishing a presumption of medical stability in AS 23.30.395(27) and the amendment of AS 23.30.185 did not apply to Harp's claim.

[90] 831 P.2d at 359.

sharp pain for two weeks in December 1998, more than half a year after he stopped working for Sourdough Express. We reject Barron's argument that the absence of an employer medical evaluation in the board's record before November 24, 1999, demonstrates that there was *no* "conflicting medical evidence" to support a controversion.

Turning again to this case, the board found that the controversion was "invalid" because the board's record did not contain *any* medical evidence to support a controversion when it was filed. Therefore, the board concluded that it did not begin the two-year time-bar. We agree that the board's finding of a complete absence of evidence to support the controversion is not supported by substantial evidence. We examine the second prong of the board's reasoning; that a controversion that is invalid for any reason does not begin the two-year time-bar in AS 23.30.110(c).

We agree with the Supreme Court's *dicta* in *Bailey v. Texas Instruments*, that a formal controversion imposes the burden of proceeding with the claim on the claimant. We agree that a controversion filed in bad faith is invalid, whether it is a formal controversion or not. We agree that a formal controversion filed in bad faith will not start the two-year time-bar in AS 23.30.110(c).[91] We do not agree that every controversion that the board ultimately finds is insufficiently supported, and therefore subject to a *Harp* penalty under AS 23.30.155(e), is filed in bad faith. The board made no findings in this case that Sourdough Express acted in "bad faith" when the controversion was filed.

A penalty is exacted when a controversion is unfair or frivolous, not only when it is filed in "bad faith." In *Harp,* the Court found that a controversion filed in "good faith" will protect an employer from imposition of a penalty under AS 23.30.155(e); clearly fairness and sufficient evidence to support the controversion are marks of good faith. Between good faith and bad faith, there is a borderland inhabited by honest mistakes, inadvertent processing errors, and petty misunderstandings that may subject the

[91] We thus reject the employer's position that any formal controversion notice filed after a claim starts the two-year time-bar, "irrespective of whether there is a good faith basis" for the claim.

employer to a penalty,[92] but are not the result of bad-faith conduct. Failure to file "in good faith" does not prove that the employer acted in "bad faith." The Supreme Court has had occasion to distinguish between frivolous claims and bad-faith conduct, finding that a claim may be frivolous but not brought in "bad faith."[93] Bad-faith conduct implies more than partial or technical insufficiency, error or negligence. An employer may have sufficient evidence that supports controversion of part of the claim, but read the evidence as supporting controversion of the entire claim, may make typographical errors, or have reasonably misunderstood the nature of the employee's claim in framing a controversion. The Supreme Court stated in *Fairbanks Fire Fighters Ass'n, Local 1324, Intern. Ass'n of Fire Fighters v. City of Fairbanks*,[94]

> when a claim lacks any legal basis, we have not hesitated to reverse a trial court's failure to find bad faith or frivolous conduct. *See Crawford & Co. v. Vienna*, 744 P.2d 1175, 1178 (Alaska 1987) (superior court erred in not finding a suit frivolous when that suit had no legal basis). A "design to mislead or deceive another" also may constitute bad faith conduct.[95]

We find that this test presents an appropriate basis for an invalid "bad faith" controversion. If, after drawing all permissible inferences from the evidence in favor of a facially valid formal controversion,[96] the board finds that it lacks *any* legal basis or

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[92] AS 23.30.155(e) permits the board to excuse the employer from penalty if the nonpayment is owing to conditions over which the employer had no control.

[93] *Crawford & Co. v. Vienna*, 744 P.2d 1175, 1178 n.4 (Alaska 1987).

[94] 934 P.2d 759 (Alaska 1997).

[95] 934 P.2d at 761. The Court noted that "Black's Law Dictionary includes 'a design to mislead or deceive another,' as well as a refusal to fulfill a contractual obligation 'not prompted by an honest mistake' as to rights or duties, 'but by some interested or sinister motive,' within the definition of bad faith." 934 P.2d at 761 n.3, citing *Black's Law Dictionary* 139 (6th ed. 1990). We note also that the Supreme Court distinguishes the frivolous from that conduct in bad faith by using the disjunctive "or."

[96] The evidence offered to rebut a presumption of claim compensability is examined alone, without weighing credibility. This means that if the evidence is susceptible to a reasonable inference in favor of the employer, it must be given that inference at this stage. The board need not draw that same inference when weighing the evidence if the presumption is overcome.

that it was *designed* to mislead or deceive the employee, the board may find that it was a bad faith controversion that does not begin the time-bar in AS 23.30.110(c).

Examining the board's decision, we find the board did not make adequate findings of fact to support its decision. It did not assign the burden of proving an excuse to the party asserting relief from operation of the statute. We find that the board imposed a greater burden on Sourdough Express than is supported by *Harp* or its progeny, by requiring the employer's controversion to be supported by evidence *in the board's record* to support the controversion at the time it was filed. The board did not make findings of fact regarding evidence in Sourdough Express's or carrier's possession in November 2001. The board did not discuss whether there was conflicting medical evidence or other evidence in support of the controversion, that, if not opposed, could result in the board finding that the employee's claim, or any part of it, could be denied. Finally, we conclude the board did not examine whether the controversion was filed in bad faith. We remand for additional findings as directed below.

b. The board may allow amendment of a timely claim to conform to newly discovered evidence, if there is no prejudice to the employer.

The board found that the employee had a latent injury; we conclude that the employee made a *claim* for a latent injury, but whether it is in fact a latent injury for which the employment is the legal cause is for the board to determine. In our view, this case perfectly illustrates what happens when a theory of injury is crammed into a case originally built on another, incompatible theory of injury. We are of the view that the board's decision to permit the "annular tear" claim to be heard is best regarded as a discretionary amendment of Barron's 2004 "cumulative injury" claim to conform to later discovered evidence, not a finding of latent injury.

When deciding whether to dismiss a claim (in the sense of a written application for benefits) on a petition that the claim (the asserted right or entitlement) fails on statute of limitation grounds, the board must determine whether the employee has alleged sufficient grounds, supported with some evidence, to make the claim (asserted

right or entitlement) that may be brought to hearing,[97] without weighing the evidence concerning the merits of the underlying claim. If the employee has alleged sufficient grounds, supported with some evidence, that his claim (written application) contains such a claim (asserted right or entitlement), the board must determine whether the claim (written application) was filed within two years of the knowledge of the injury. It is the employer, as the party asserting an affirmative defense, that bears the burden of persuading the board that the claim is barred.

In this case, Barron alleged that he filed his 2004 "cumulative injury" claim within two years of the date that he knew or in the exercise of reasonable diligence should have known of the cumulative injury and its relationship to the employment. He claimed that until the "L-4-5 protrusion" was discovered following the onset of severe back pain and spasms in December 2003 he did not know he had that specific injury.[98] He filed his claim in 2004[99] and later discovered the annular tear, also called a disc tear, at the L4-5.

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[97] Failure to file a claim on time is not a bar to compensation unless objection to the failure is made "at the first hearing of the claim." AS 23.30.105(b).

[98] Barron opposed the motion for extraordinary review, and, when appeal was permitted, did not cross-appeal the board's determination that his claims for compensation for degenerative disc disease and muscle spasm or strain are barred by the statute of limitations.

[99] Barron's new theory of injury is that the hard physical labor over the whole period of employment, rather than any single event, caused the disablement and need for medical care. To be timely, Barron's 2004 claim must have been filed within two years of his knowledge of the cumulative injury and its relationship to the employment. The theory of such claims is that a repeated micro-trauma in the employment caused the gradual onset of injury, rather than any specific accident. It is a theory incompatible with a claim of specific injury bringing about the disability. The problem with such claims is the practical difficulty of fixing a date for the "accidental injury." AS 23.30.395(24). Although the Alaska Supreme Court has not expressly disavowed the concept that "accidental injury" must be traceable to some definite time and place of origin, it has long held that "working conditions" may be a legal cause of a disability, and thus give rise to a claim for compensation. *See Burgess Constr. Co. v. Smallwood,* 623 P.2d 312 (Alaska 1981); *Fox v. Alascom, Inc.,* 718 P.2d 977 (Alaska 1986). In our view, date of injury of such claims is the last day the employee engaged in the work activity that he or she alleges brought about the "cumulative" injury.

Sourdough Express argues that because Barron knew he had degenerative disc disease and had been diagnosed with a bulging disc at the L4-5, he was effectively on notice that the condition would progress and ultimately result in the annular tear. Sourdough Express argues that the disc tear is simply the progression of the condition of which he was well aware. Our review of the medical reports does not reveal a clear warning or prediction to Barron that his condition would result in a protruding or herniated disc and an annular tear in the near future. The report by Dr. Simpson, detailing the proposal for a discogram and his frank discussion of possible surgery, certainly supports an inference that Dr. Simpson informed Barron of the degeneration of the L4-5 disc, but it does not contain a warning to Barron of the expected progression of the degenerative process. The board chose not to infer that Dr. Simpson gave Barron such a warning or prediction. The board's decision not to draw that inference from Dr. Simpson's report is not so unreasonable that we may disturb it on appeal.

Sourdough Express argues that Barron knew that he was disabled by back pain as early as 1994, and that his testimony reveals that he was aware of his back condition's impact on his ability to work no later than 1998. The board agreed and disallowed claims for compensation based on degenerative disc disease and muscle spasm or strain. Unless Sourdough Express is able to establish that Barron was informed of the likely progression of his condition, however, the knowledge of his back pain, muscle spasm, and degenerative disc disease does not eliminate the possibility that he did not know until December 2003 that his disc was protruding, nor, until February 2005, that he had an annular tear, and that, instead of being caused by any particular incident, it was caused by the cumulative impact of his work.

In *Egemo v. Egemo Constr. Co.,* the Supreme Court emphasized that "both the knowledge [of the nature of the injury and its relationship to employment] and the

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Treaster v. Dillon Cos., Inc., 987 P.2d 325 (Kansas 1999). However, as with any claim, the date the statute of limitations begins is not necessarily the same as the date of the injury. *See Herrara v. IBP, Inc.,* 633 N.W.2d 284 (Iowa 2001).

disablement must be conjoined before the employee is required to file a claim."[100] Egemo was informed that he would need surgery at some point in the future to correct a varus deformity in a malunion of his left lower leg, injured in a work accident. He did not file a claim until the surgery was planned, some ten years later.[101] The knowledge and the disablement did not "conjoin" until the surgery occurred.

In *Aleck v. Delvo Plastics, Inc.*,[102] Beverly Aleck was paid disability benefits for a 1973 staple puncture to her thumb, including an increase in her permanent partial disability compensation associated with a new impairment rating in 1976. Almost 20 years later, she filed a claim for benefits associated with symptoms of numbness she alleged started in 1993, and that her physician tied to her 1973 injury in 1995.[103] The Supreme Court held that there was not substantial evidence to support the board's finding that Aleck was aware of the nature of her injury from the beginning.[104] Because Delvo did not present any evidence to contradict Aleck's assertions that her symptoms worsened in 1993 and that she received medical attention in 1994, the board's dismissal of the claim was reversed.[105]

In *Dafermo v. Municipality of Anchorage,* [106] Dafermo claimed that his work at a computer in 1985 to 1986 made a visual impairment due to a "neurological dysfunction" more symptomatic, but that the link between the symptoms and the work did not become apparent until the diagnosis of the neurological dysfunction was conveyed to him in 1991.[107] The Supreme Court held that the board did not have substantial evidence to find that Dafermo "could have come to know the nature of his disability

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100 998 P.2d 434, 440 (Alaska 2000).

101 *Id.* at 439.

102 972 P.2d 988 (Alaska 1999).

103 972 P.2d at 989.

104 *Id.* at 991.

105 *Id.* at 992.

106 941 P.2d 114, 116 (Alaska 1997).

107 *Id.* at 115-116.

long before" the neurological dysfunction diagnosis was conveyed to him in 1991.[108] The Court reminded the board that a layman should not be expected to diagnose a condition his physicians failed to diagnose.[109] Because the board found that the 30-day notice of injury period did not begin to run until he received the neurological dysfunction diagnosis, the board could not find that Dafermo's two years to file a claim began to run prior to the same diagnosis.[110]

We are not convinced that Barron's claim fits squarely in the framework of *Aleck* or *Dafermo*. Unlike Aleck, Barron is not claiming that his 2003 worsening was due to a specific incident. Unlike Dafermo, Barron is not claiming he had no knowledge of the link between his symptoms (back pain) and his working conditions. Barron's 2004 claim of cumulative injury is not a claim based on a last work-related injury, in a series of work-related injuries, culminating in a particular disability, as the term was used in *Saling v. Ketchikan Gateway Borough.*[111] It is instead a claim that his working conditions, not specific injuries, aggravated a pre-existing condition over a period of years so as to be a substantial factor in bringing his disability and need for medical treatment.

We agree that there is substantial evidence that Barron knew what his working conditions were. There is evidence that he knew he had "slipped discs." He knew he had suffered some back injuries in his employment. There is substantial evidence to support the board's findings that he knew of the degenerative disc disease and muscle strains well before the 1999 claim and their relationship to the employment. But, the question before the board was whether he filed his 2004 claim within two years of being aware of the nature (gradual or repetitive "micro-trauma") and extent (protruding discs and annular tear) of his injury and its relationship to his known working

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108 *Id.* at 119.

109 *Id.*

110 *Id.*

111 604 P.2d 590, 596 (Alaska 1979) ("[W]here the preexisting condition is work-related, this rule would also operate effectively in conjunction with the second injury fund to provide a workable approach to the cumulative injury situation.").

conditions.[112] We agree that there is substantial evidence to support the board's finding that he filed a claim within two years of the specific December 2003 "worsening" identified by the board and the conjoining of knowledge, need for treatment, and potential disability.[113] Although the board characterized its finding of the 2005 "annular tear" as a "latent injury," we believe that it is rather a case of the board amending the "cumulative injury" claim to conform to later developed evidence, since that injury, not known at the time the claim was filed, could not have been a discovered "latent" injury.

Many of the employer's remaining arguments are addressed to whether the employment was a substantial factor in bringing about the disability and the need for medical care in view of the interval and subsequent employment between the cessation of the working conditions and the need for medical care and potential disability. In deciding Barron's 2004 claim, the board also will have to decide the effect of prior claim dismissals on the current cumulative injury claim. We find, however, that the board did not make a finding of a *compensable* latent injury, rather it permitted Barron to bring his claim of a cumulative injury to hearing. We agree that the board's amendment of the cumulative injury claim was within its discretion. We affirm the denial of the petition to dismiss the 2004 claim as barred by the statute of limitations.

6. Conclusion and order.

We VACATE the board's order dismissing the petition to dismiss the 1999 claim for benefits. We REMAND to the board for rehearing and specific findings of fact in accordance with our decision. We instruct the board to decide if the employer filed a facially valid formal controversion and if the employee filed a request for hearing within two years. If not, the employee, to avoid dismissal of his 1999 claim for benefits, must establish that failure to file a request for hearing is excused because the controversion was filed in bad faith. Bad faith may be established by a showing that the employer

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[112] *See Leslie Cutting, Inc. v. Bateman,* 833 P.2d 691, 694 (Alaska 1992).

[113] *See W.R. Grasle Co. v. Alaska Workmen's Comp. Bd.,* 517, P.2d 999, 1004 (Alaska 1974).

lacked any legal basis for the controversion or that it was designed to mislead or deceive the employee.

We AFFIRM the board's denial of the appellant's petition to dismiss Barron's 2004 cumulative injury claim. We direct that the injury date on the claim be conformed in accordance with this decision.

Date: *7 February 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Philip Ulmer
Philip Ulmer, Appeals Commissioner

Jim Robison
Jim Robison, Appeals Commissioner

Kristin Knudsen
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision that denied the employer's petition for dismissal of the employee's 2004 claim for compensation and benefits. The appeals commission vacated (invalidated) the board's decision denying the petition to dismiss the remainder of the employee's 1999 claim and remanded (returned) the case to the board for rehearing and further findings of fact. This decision does NOT end all administrative proceedings on the employee's claims. The board has not heard the merits of the employee's 2004 claim, and its decision after rehearing on whether the 1999 claim is barred by operation of AS 23.30.110(c) may, or may not, be different. This decision becomes effective when the office of the appeals commission mails or otherwise distributes the decision to the parties or their representatives, unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted. Look at the clerk's Certificate in the box below to see the date of mailing or other distribution.

If you wish to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed to you. The appeal must 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. Because this is not a final decision on the merits of the workers' compensation claim, the Supreme Court 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. If you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If you wish the commission to reconsider its decision, you must file a written request for reconsideration within 30 days of the date of service (mailing) of the decision. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed or otherwise distributed to the parties, or, if the commission does not issue 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) lists the reasons you may request reconsideration.

If you wish to appeal this decision 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 BY THE APPEALS COMMISSION

A party may ask the appeals commission to reconsider this decision by filing a motion requesting reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals 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 Alaska Workers' Compensation Appeals Commission Decision No. 069, the final decision and order in the matter of Sourdough Express, Inc. and Alaska National Insurance Co. v. Darrell Barron, Appeal No. 06-036, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this __*7th*__ day of ___*February*__, 20_*08*_.

__*L. Beard*_____
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION
I certify that a copy of this Decision No. 069, the Final Decision and Order in AWCAC Appeal No.06-036, was mailed on _*2/7/08*_ to R. Wagg and A. Vacura at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, AWCB Fbx, R. Wagg & A. Vacura.

_*L.Beard*_____ *2/7/08*
L. Beard, Appeals Commission Clerk Date