

# Alaska Workers' Compensation Appeals Commission

Interior Fuels and SeaBright Insurance  
Co.,

Movants,

vs.

David Hornbeck,  
Respondent.

## Final Decision

Decision No. 085 July 31, 2008

AWCAC No. 08-016

AWCB Dec. No. 08-0072

AWCB Case No. 200301448

Motion for Extraordinary Review from Alaska Workers' Compensation Board Decision No. 08-0072, issued April 17, 2008, at Fairbanks, Alaska by northern panel members Fred G. Brown, Chair, and Damian Thomas, Member for Labor.

Appearances: Erin K. Egan, Russell Wagg Gabbert and Budzinski, P.C., for movants Interior Fuels and SeaBright Insurance Co. David Hornbeck, pro se, respondent, by telephone.

Commission proceedings: Hearing on motion for extraordinary review held July 2, 2008.

Commissioners: David W. Richards, Stephen T. Hagedorn, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

### *1. Introduction.*

Interior Fuels and its insurer ask the commission to grant extraordinary review of the board's April 17, 2008, decision denying a petition to dismiss David Hornbeck's third and fourth claims for workers' compensation. Movants contend that the board erroneously interpreted the commission's decision in *Univ. of Alaska Fairbanks v. Hogenson*<sup>1</sup> and that postponement of review until a final decision may be appealed will

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<sup>1</sup> Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 28, 2008).

result in injustice and unnecessary delay, significant expense, or undue hardship.<sup>2</sup> Movants also ask the commission to allow a late-filed motion for extraordinary review. Movants contend that the board's error is so egregious that a late-filed motion should be allowed to avoid injustice. Respondent David Hornbeck opposes the motion. Respondent concedes that it may be more efficient to allow the commission to correct any errors in the board's interpretation of the commission's decision in *Univ. of Alaska Fairbanks v. Hogenson* before a hearing on the merits of his claim. However, he contends that it is not fair to allow movants to file their motion late while they argue his claim is barred because he also filed documents late.

The commission finds that adherence to the time limit for filing a motion for extraordinary review will not produce injustice because the board's errors may be readily corrected on appeal and movants were fully prepared to go to hearing on the merits of the claims. Further development of the record may result in a change in the board's determinations. Therefore, the commission denies the motion for extraordinary review.

## 2. *Factual background and proceedings before the board.*

When considering a motion for extraordinary review, the commission does not have a copy of the board's record to review. The commission does not examine the board's findings of fact to determine if the findings are supported by substantial

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<sup>2</sup> Movants' Mot. for Extraordinary Rev. at 5, citing 8 Alaska Admin. Code 57.076(a)(1). Movants also assert that review should be granted because "immediate review will accelerate termination of litigation." *Id.* However, a showing that review will accelerate termination of the litigation is not sufficient by itself to grant extraordinary review. Movants must also demonstrate grounds under 8 Alaska Admin. Code 57.076(a)(2)(A) or .076(a)(2)(B). Movants did not present argument or evidence addressing subpart (A) or (B), except to the extent that movants argued the board erred in its interpretation of the commission's decision in *Univ. of Alaska Fairbanks v. Hogenson*. Movants do not argue that the commission decision poses substantial grounds for difference of opinion; their argument is that there are *no* grounds for difference of opinion because the commission's recent decision settles the issue. A single board panel's errant decision does not present the "substantial grounds for difference of opinion," that require *immediate* review; it involves no "important question of law on which board panels have issued differing opinions" because it is *singular*.

evidence. This summary of the facts and account of proceedings before the board is derived from the board's decision and the arguments presented by the parties.

Hornbeck reported he injured his lower back at work when he slipped on the ice February 5, 2003. Hornbeck continued to work until he was terminated for reasons not related to his injury in August 2003. He filed a workers' compensation claim on April 28, 2004, for temporary total disability benefits from February 5, 2003 and continuing into the future, and it was controverted June 1, 2004. After two employer medical examinations, Interior Fuels controverted this claim again on September 27, 2004.

Hornbeck filed a second workers' compensation claim on October 12, 2004, asking for temporary total disability compensation from August 2003 and into the future, medical costs, penalties and interest. This claim was controverted on November 22, 2004. A little more than a year later, in December 2005, Hornbeck filed his third workers' compensation claim. This time he requested temporary total disability benefits from September 29, 2004 and continuing into the future. Interior Fuels controverted this claim as well on January 3, 2006. Almost a year later, on November 4, 2006, Hornbeck filed a fourth claim, requesting temporary total disability compensation, permanent disability compensation (total and partial), medical costs, and a Second Independent Medical Examination. This claim was controverted November 27, 2006.

On August 8, 2007, Hornbeck filed an affidavit of readiness to proceed on all four claims. Interior Fuels petitioned to dismiss the claims as barred by AS 23.30.110(c) and AS 23.30.105. The board, which had scheduled a hearing on the merits of Hornbeck's claims, granted a continuance as to the merits to allow Hornbeck more time to find an attorney, but chose to decide the petition in an interlocutory order. The board said of the time-bar in AS 23.30.110(c) that

Dismissal under AS 23.30.110(c) is automatic and non-discretionary.<sup>3</sup> In *Tipton v. ARCO Alaska, Inc.*,<sup>4</sup> the Alaska

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<sup>3</sup> See, e.g., *Beaman v. Kiewit Constr.*, Alaska Workers' Comp. Bd. Dec. No. 06-0101 (Apr. 27, 2006), *Pool v. City of Wrangell*, Alaska Workers' Comp. Bd. Dec. No. 99-0097 (Apr. 29, 1999); *Westfall v. Alaska Int'l Constr.*, Alaska Workers' Comp. Bd. Dec. No. 93-0241 (Sept. 30, 1993).

Supreme Court noted the language of section 110(c) is clear, requiring an employee to request a hearing within two years of the date of controversion or face dismissal of his or her claim. The court also noted that the defense of statute of limitations is "generally disfavored," and that neither "the law [n]or the facts should be strained in aid of it."<sup>5</sup> Indeed, in *University of Alaska Fairbanks v. Hogenson*,<sup>6</sup> the Workers' Compensation Appeals Commission found that changes in the date of TTD claimed may trigger a new string of benefits, despite the statutory bar of an earlier claim.<sup>7</sup>

The board dismissed Hornbeck's 2004 claims as time-barred.<sup>8</sup> His third claim, filed in November 2005, the board found was within two years of the August 2007 request for hearing and the claim for temporary total disability benefits was not barred because, it reasoned,

[i]n *Walter Bailey v. Geophysical Services, Inc.*, we held that simply re-filing a claim for the same benefits originally sought does not toll the running of AS 23.30.110(c). Nevertheless, based on the Appeals Commission's reasoning in *University of Alaska Fairbanks v. Hogenson, supra.*, we find the running of the Statute of Limitations under AS 23.30.110(c) does not relate back to the employee's previous claims, such as to require dismissal of the third claim. Instead, given that a new date of TTD is requested, we find this third claim is not barred by AS 23.30.110(c).<sup>9</sup>

The board reasoned that Hornbeck's fourth claim, filed in November 2006, was not barred because Hornbeck

requested, for the first time, PTD benefits and PPI benefits. Accordingly, for the reasons outlined in *University of Alaska Fairbanks v. Hogenson, supra.*, we find the employee's fourth benefit claim does not relate back to his first two filed-and-

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<sup>4</sup> 922 P.2d 910, 912-13 (Alaska 1996).

<sup>5</sup> *Id.* at 911.

<sup>6</sup> Alaska Workers' Comp. App. Comm'n Dec. No. 074, 17 (Feb. 20, 2008).

<sup>7</sup> *David W. Hornbeck v. Interior Fuels*, Alaska Workers' Comp. Bd. Dec. No. 08-0072, 4 (April 17, 2008) (F. Brown, Chair) (footnotes included).

<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* (footnotes omitted).

dismissed claims, and his fourth claim is not barred by AS 23.30.110(c).<sup>10</sup>

The board also found that AS 23.30.105(a), requiring a claim for workers' compensation to be filed within two years of the last payment of workers' compensation did not bar Hornbeck's 2005 claim because it was filed within two years of the last payment of compensation made to Hornbeck on September 29, 2004.<sup>11</sup> However, the fourth claim was filed two years and one month after the last payment of compensation. The board found the employer was not prejudiced by the delay and that,

given the employee's lack of post-secondary education, and the apparent occurrence of new events, including his failed attempt to return to work, leading to the filing of PTD and PPI claims, we conclude the employee did not know the nature of his disability and its relation to his employment, to justify dismissal under AS 23.30.105.<sup>12</sup>

Interior Fuels filed a timely petition for reconsideration on April 30, 2008, based on the commission's decision in *Hogenson*.<sup>13</sup> The board did not respond, so the petition for reconsideration was considered denied by operation of law on Monday, May 19, 2008.<sup>14</sup> Eleven days later, on May 30, 2008, Interior Fuels and its insurer filed this motion for extraordinary review.

### *3. Discussion.*

#### *a. The motion for extraordinary review was filed late and did not comply with commission regulations.*

The commission's regulations provide at 8 Alaska Admin. Code 57.072(a):

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<sup>10</sup> *Id.* at 6.

<sup>11</sup> *David W. Hornbeck*, Alaska Workers' Comp. Bd. Dec. No. 08-0072 at 6.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> AS 44.62.540(a) requires a petition for reconsideration to be filed within 15 days of the date of distribution of the decision; in this case, the last day to request reconsideration was May 2, 2008.

<sup>14</sup> AS 44.62.540(a) provides that the power to order reconsideration expires 30 days after the date of distribution of the decision; because the thirtieth day fell on a Saturday, the power to order reconsideration expired on the following Monday.

A motion for extraordinary review of an interlocutory or other non-final board decision or order must be filed with the commission

(1) within 10 days after the date of service of the board order or decision from which review is sought; and

(2) before the filing of a timely motion for reconsideration of the board order or decision from which review is sought.

The board's interlocutory decision and order was issued on April 17, 2008. The commission finds that movants filed the motion for extraordinary review in the commission's office on Friday, May 30, 2008. The commission finds that Monday, April 28, 2008, was the last day a party could have filed a timely motion for extraordinary review of the board's April 17, 2008 interlocutory order.<sup>15</sup> Therefore, the commission finds the motion for extraordinary review was filed 32 days late.<sup>16</sup>

The commission regulations also require that a motion for extraordinary review be filed *before* a request for reconsideration. This is to allow the commission to take up the matter promptly, before the board engages in further proceedings and the case has taken on its own momentum. On the other hand, the commission's regulation allows the party an additional 5 days to file a motion for reconsideration before the board, so that the party's options are not foreclosed and the board may have the opportunity to correct any errors.<sup>17</sup> Movants concede that they filed a petition for reconsideration of the board's interlocutory order on April 30, 2008, two days after the last day to file a motion for extraordinary review. The commission also finds the motion for

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<sup>15</sup> The tenth day following the date the board's decision and order was issued fell on Sunday, April 27, 2008. Because the last day of the ten-day period to file a motion for extraordinary review was a Saturday, Sunday or holiday, the period ran to the end of the next day that is not a Saturday, Sunday or holiday – Monday, April 28, 2008. 8 Alaska Admin. Code 57.060.

<sup>16</sup> Even if a motion for extraordinary review could be initiated from a decision on reconsideration, this motion is late. The tenth day after Interior Fuels' petition for reconsideration was deemed denied was Thursday, May 29, 2008. The motion was not filed until May 30, 2008.

<sup>17</sup> The commission, if informed that a request for reconsideration is filed with the board, may suspend proceedings on the motion for extraordinary review until informed of the board's decision.

extraordinary review was filed 30 days after “filing of a timely motion for reconsideration” of the board’s interlocutory decision and order.

The commission finds that the motion for extraordinary review was filed late and, because it was filed *after* the request for board reconsideration, it did not comply with the commission’s regulations.

*b. Identification of board error is not sufficient alone to establish injustice that would compel the commission to relax the time period for filing a motion for extraordinary review under 8 Alaska Admin. Code 57.270.*

Movants’ counsel conceded at hearing that the movants made a strategic choice to request reconsideration from the board rather than (1) file a motion for extraordinary review with the commission or (2) file a motion for extraordinary review with the commission *and* request board reconsideration. Movants now seek to be relieved of the consequences of that choice because, they assert, the board’s errors are so obvious that it is unjust to require movants to proceed to hearing on the merits and then appeal the board’s decision if it is unfavorable.

The commission “adheres to the strong policy favoring appeals from final decisions, even in the face of possible board error.”<sup>18</sup> The commission recognizes that all appeals allege board error; “legal error, if it exists, generally will not result in injustice if the error is corrected on appeal.”<sup>19</sup> Therefore, identifying board error is insufficient alone to establish that injustice will occur if the board error may be corrected on appeal.

An important legislative policy of the workers’ compensation statutes is that “workers’ compensation cases shall be decided on their merits except where otherwise provided by statute.”<sup>20</sup> The courts also have found that “a full adversary treatment of

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<sup>18</sup> *Alcan Elec. v. James*, Alaska Workers’ Comp. App. Comm’n Dec. No. 084, 8 (July 18, 2008).

<sup>19</sup> *Id.* at 9 (citing *BP Exploration Alaska, Inc. v. Stefano*, Alaska Workers’ Comp. App. Comm’n Dec. No. 076, 19, 2008 WL 2065075 \*19 (May 6, 2008)).

<sup>20</sup> AS 23.30.001(2).

all issues of fact and law by the trial court, before resorting to the appellate court, has been found to be a sound policy."<sup>21</sup> In furtherance of a strong policy favoring appeals from final decisions, the commission's regulations establishing extraordinary review were designed to avoid interference in the board's fact-finding process and to favor review after the parties have exercised their rights to present and challenge evidence and the board has an opportunity to fully develop the record and weigh the evidence.

Movants conceded at oral argument that further development of the board's record will enable the commission to better review the issues presented by the board's decision regarding respondent's knowledge of his disability and operation of the statute of limitations in AS 23.30.105(a). The board may have a different view of the law in the light of facts developed during the hearing on the merits, despite the apparently conclusive finding the board made concerning Hornbeck's knowledge of his disability and its relationship to the employment in application of AS 23.30.105(a).<sup>22</sup>

The legal error asserted by movants is that the board misinterpreted the commission's decision in *Univ. of Alaska Fairbanks v. Hogenson*.<sup>23</sup> The commission finds that the movant established a strong possibility of board error. The board said that "in *University of Alaska Fairbanks v. Hogenson*, the Workers' Compensation Appeals Commission found that changes in the date of TTD claimed may trigger a new string of benefits, despite the statutory bar of an earlier claim."<sup>24</sup> This is an incomplete restatement of the commission's holding.

The commission held that a

request for benefits made in the 2001 written claim and time-barred may not be revived by filing a later claim for the same benefits based on the same injury. However, to the extent

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<sup>21</sup> *State v. Hillstrand*, 352 P.2d 633, 635 (Alaska 1960).

<sup>22</sup> *See Hillstrand*, 352 P.2d at 634.

<sup>23</sup> Movants' Mot. for Extraordinary Rev. at 8 (discussing *Univ. of Alaska Fairbanks v. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 20, 2008)).

<sup>24</sup> *David W. Hornbeck*, Alaska Workers' Comp. Bd. Dec. No. 08-0072 at 5.



*different benefits* are requested in a later claim, the expiration of the time-bar in the earlier claim does not affect the later claim.<sup>25</sup>

The commission stated

we hold that denial and dismissal of a particular claim under AS 23.30.110(c), after the dilatory party is given notice and opportunity to present evidence and argue against dismissal of the claim, has the effect of dismissal with prejudice, and precludes raising a later claim for the same benefit, arising from the same injury, against the same employer, based on the same theory (nature) of injury.<sup>26</sup>

The commission held that Hogenson's 2001 claim for temporary disability from August 22, 2000 and continuing, (dismissed by the board pursuant to AS 23.30.110(c)), did not preclude his 2002 claim (for disability compensation from June 22, 2000 and continuing), but only to the extent it was not duplicated by the earlier, dismissed claim. The result was, as the commission noted, that "only about two months of temporary total disability compensation (June 22, 2000 to August 21, 2000)" remained at issue in the 2002 claim.<sup>27</sup> The period after August 21, 2000, included in "and continuing" in the 2001 claim, was not revived or preserved. The fact that the second claim described a benefit (temporary disability compensation from June 22, 2000 and continuing as far as the beginning date of the first claim) that was not described in the earlier claim that preserved part of the claim for temporary total disability compensation; not simply listing a different start date.

In this case, respondent Hornbeck's dismissed second claim was for temporary total disability compensation from August 2003 and continuing; his third claim was for temporary total disability compensation from September 29, 2004 and ongoing. The later claim for temporary total disability compensation, on its face, describes a period of temporary total disability compensation that is duplicated in the earlier claim. However, because the commission also held in *Univ. of Alaska Fairbanks v. Hogenson* that a claim

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<sup>25</sup> *Univ. of Alaska Fairbanks v. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074 at 1.

<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.* at 17, n. 91.

for periodic temporary total disability benefits described as from a date certain "and ongoing" or "and continuing" means from the date certain to the "first date of medical stability thereafter,"<sup>28</sup> it is possible the board was not mistaken in its interpretation. If Hornbeck reached medical stability at some point between August 2003 and September 29, 2004, and later, on September 29, 2004, lost medical stability, the claims would not be duplicative. This issue will benefit from a full development of the record and clear findings by the board. The board also will have the opportunity to correct any errors of interpretation when reaching a final decision.

Movants conceded that they had been fully prepared for the scheduled hearing on the merits of Hornbeck's claims, so bringing the case to hearing was not a surprise. Movants do not assert their rights were adversely affected by the continuance granted at Hornbeck's request. The commission finds movants have not demonstrated that injustice compels the commission under 8 Alaska Admin. Code 57.270 to disregard movants' delay in filing the motion for extraordinary review. Therefore, the motion for extraordinary review must be denied as untimely.

*4. Conclusion.*

The motion for extraordinary review is DENIED.

Date: July 31, 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

*Signed*

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Stephen T. Hagedorn, Appeals Commissioner

*Signed*

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David W. Richards, Appeals Commissioner

*Signed*

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Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this motion for extraordinary review, but it is not a final decision on the merits of Mr. Hornbeck's claims for workers' compensation in AWCB Case No. 200301448. The effect of this decision is that Mr. Hornbeck's workers' compensation claims may proceed to hearing or other resolution before the Alaska Workers' Compensation Board.

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<sup>28</sup> *Id.*

