Case: *Interior Fuels and SeaBright Insurance Co. vs. David Hornbeck*, Alaska Workers' Comp. App. Comm'n Dec. No. 085 (July 31, 2008)

Facts: David Hornbeck injured his lower back at his work on February 5, 2003. Hornbeck filed four claims. The first, filed in April 2004, for temporary total disability (TTD) benefits from February 5, 2003, and continuing, was controverted in June 2004. The second, filed in October 2004, sought TTD benefits from August 2003 and continuing, medical costs, penalties and interest. This claim was controverted in November 2004. The third, filed in December 2005, sought TTD from September 29, 2004, and continuing. This was controverted in January 2006. The fourth was filed in November 2006, seeking TTD, both types of permanent disability compensation, medical costs and a second independent medical exam. This claim was controverted in November 2006. On August 8, 2007, Hornbeck filed an affidavit of readiness for hearing on all four claims. The employer petitioned to dismiss the claims as barred by AS 23.30.110(c), which requires an employee to request a hearing on a claim within two years of an employer's controversion, and AS 23.30.105(a), which requires a claim to be filed within two years of the last payment of workers' compensation or within two years after the employee knows the nature of his disability and its relationship to his work.

The board dismissed Hornbeck's first two claims as time-barred under AS 23.30.110(c). The board allowed his third and fourth claims to proceed. The third claim was timely filed under .105(a) and .110(c), and the employee sought different benefits than those in the time-barred claims because the dates of TTD were different. On the fourth claim, the hearing request was timely and Hornbeck sought different benefits than the ones in the time-barred claims. He was one month late in filing this claim under .105(a) but the board concluded that the employer was not prejudiced by the delay and Hornbeck did not know the nature of his disability and its relationship to his employment until he tried and failed to return to work.

The employer sought extraordinary review. The employer filed the motion late but argued the board's error was so egregious that a late-filed motion should be allowed to avoid injustice. The employer contended that the board erroneously interpreted *Univ. of Alaska Fairbanks v. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 28, 2008), and that postponement of review until a final decision may be appealed "will result in injustice and unnecessary delay, significant expense, or undue hardship" under 8 AAC 57.076(a)(1). The employer also asserted that immediate review will speed up the end of litigation under .076(a)(2).

Applicable law: Former 8 AAC 57.072(a), repealed in 2011 (see below for an explanation) provided:

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

Former 8 AAC 57.076(a), repealed in 2011, provided in relevant part:

> The commission will grant a motion for extraordinary review if the commission finds the sound policy favoring appeals from final orders or decisions is outweighed because
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> (1) postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay, significant expense, or undue hardship;
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> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> (A) the order or decision involves an important question of law on which there is substantial ground for difference of opinion; or
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> (B) the order or decision involves an important question of law on which board panels have issued differing opinions; . . .

8 AAC 57.270(a) provides:

> For an appeal under this chapter, the chair, panel, or commission may order time periods . . . that differ from time periods . . . established in this chapter, if
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> (1) strict adherence to time periods . . . would work injustice; and
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> (2) the change would assist in facilitating the business of the commission or advance the prompt, fair, and just disposition of appeals.

"A claim of legal error is inherent in any appeal; legal error, if it exists, generally will not result in injustice if the error is corrected on appeal." *Eagle Hardware & Garden v. Ammi*, Alaska Workers' Comp. App. Comm'n Dec. No. 003, 11 (February 21, 2006).

Issues: Should the commission consider a late-filed motion for extraordinary review (MER)? Should the commission grant extraordinary review and hear the merits on appeal?

Holding / analysis: The commission denied the MER as untimely and found adhering to the filing deadline would not work an injustice since the criteria for review were not satisfied. The commission found that the MER was filed late and, because it was filed *after* the request for board reconsideration, it did not comply with the commission's regulations. The board's interlocutory decision was issued on April 17, 2008. The employer sought reconsideration on April 30, 2008. A timely MER should have been filed on or before April 28, 2008, as well as before the motion for reconsideration. But the MER was filed May 30, 2008, 32 days late.

The commission concluded that review should not be granted under .076(a)(2) because the employer did not demonstrate grounds under .076(a)(2)(A) or .076(a)(2)(B). There was no difference of opinion because *Hogenson* settled the issue, and a single board

panel's decision cannot involve any "important question of law on which board panels have issued differing opinions" because it is singular.

The commission observed that the board may have erred in its interpretation of *Hogenson*. *Hogenson* provided that "denial and dismissal of a particular claim under AS 23.30.110(c) . . . 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." Dec. No. 074 at 14. *Hogenson* permitted a TTD claim to survive only to the extent that two months of the claim did not duplicate an earlier claim for TTD that was time-barred. The commission observed that Hornbeck's time-barred second claim for TTD and his third claim overlapped if Hornbeck was arguing he became eligible for TTD in August 2003 and continuing through September 29, 2004, and continuing. However, if Hornbeck reached medical stability, which ends entitlement to TTD, sometime after August 2003, and then became eligible for TTD again starting on September 29, 2004, his third claim would not be precluded.

The commission concluded that further development of the record might result in a change in the board's determinations, such as clarifying his claim to TTD and elaborating on when he understood that his injury was permanently disabling and its relationship to his work. Thus, extraordinary review would interfere with board's fact-finding process, and the parties could raise the issue of this legal error in a later appeal, if necessary.

Note: The commission's MER regulations, 8 AAC 57.072, .074, .076, were repealed effective 3/27/11. The commission enacted new regulations, 8 AAC 57.073, .075, .077, effective 12/23/11, providing for petitions for review of non-final board decisions based on similar but not identical criteria as those under the MER regulations.