

**Case:** *ARCO Alaska, Inc. and ACE USA vs. James G. McKenna*, Alaska Workers' Comp. App. Comm'n Dec. No. 174 (January 3, 2013)

**Facts:** James McKenna (McKenna) suffered two work-related back injuries while working for ARCO Alaska, Inc. (ARCO), in 1988 and 1990.

McKenna's primary medical providers were Dr. James and, after 1998, Dr. McIntosh. Neither communicated to McKenna that he was permanently disabled as a result of the ARCO injuries. Dr. McIntosh signed a "Physician Certification for Family or Medical Leave" for McKenna to be off work from April 12, 2008, to June 25, 2008, for a chronic condition that was expected to last more than three months and rendered him totally unable to work. She stated that he was "presently incapacitated," not that he was permanently disabled. However, McKenna never returned to work when his medical leave was exhausted on June 25, 2008.

Dr. McIntosh noted that the condition that incapacitated McKenna began in 2003. This appears to be a reference to McKenna's cervical condition as the reason he was presently incapacitated, because the first record of McKenna being treated for his neck was the electrodiagnostic studies performed by Dr. James on July 15, 2003. In contrast, it was McKenna's thoracic problems that manifested themselves following the work incidents in 1988 and 1990. Lastly, Dr. McIntosh, when treating McKenna on August 8, 2008, reported that the appointment was a follow-up in connection with a workers' compensation matter, and that he had "[c]hronic myofascial pain syndrome that originated with a thoracic injury."

McKenna applied for social security disability benefits on June 27, 2008, reporting that he was unable to work due to nerve damage, arthritis, degenerative disc disease, and ruptured and bulging discs. On November 22, 2008, the Social Security Administration found McKenna eligible for Social Security Disability (SSD) benefits. McKenna qualified based on discogenic and degenerative disorders of the back; his date of disability was determined to be March 25, 2008.

McKenna filed a claim for permanent total disability (PTD) benefits on August 23, 2010, identifying both the 1988 and 1990 injury dates. ARCO controverted in part arguing McKenna's claim was time-barred by AS 23.30.105(a). The board rejected this affirmative defense and ARCO appeals.

**Applicable law:** AS 23.30.105 provides:

(a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . .

(b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim. . . .

The burden of proof is on the employer to establish the affirmative defense of failure to file a timely claim under subsection .105(a). The Alaska Supreme Court (supreme

court) disfavors such a defense. *Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 438 (Alaska 2000).

Interpreting supreme court case law, the commission concluded that McKenna had to have actual, subjective knowledge of his disability and its relationship to his employment. Dec. No. 174 at 17.

AS 23.30.122 states in part: "The findings of the board are subject to the same standard of review as a jury's finding in a civil action." The commission stated:

Adapting that standard to our review of the board's finding here, the commission concludes that we can overturn it only if the evidence, when viewed in the light most favorable to McKenna, reveals that the board's finding is unreasonable. Consistent with case law, the foregoing standard is an objective, deferential one. If there is room for diversity of opinion, then the finding is one for the board to make. Dec. No. 174 at 20 (citation omitted).

**Issues:** Did the board err in declining to dismiss McKenna's disability claim under AS 23.30.105(a)? Did the board err in concluding that McKenna's claim was not barred under AS 23.30.105(b)?

**Holding/analysis:** The board had substantial evidence to conclude that ARCO had not proved that McKenna both knew of his disability and its relation to his work before August 23, 2010. McKenna could not know of his disability until, at the very earliest, the end of March 2008 because that was when he stopped working and became permanently disabled. Thus, McKenna's claim would not have been time-barred until the end of March 2010, at the very earliest. McKenna filed his claim on August 23, 2010.

Even though McKenna was treated for his thoracic injuries for many years, the record does not reflect that any medical provider commented that he was permanently disabled in relation to those injuries prior to August 23, 2010. The commission viewed McKenna's filing for SSD as some evidence that he was disabled but that evidence did not prove he related his disability to the 1988 and 1990 employment injuries. Moreover, the commission concluded that questioning at McKenna's deposition in 2011 was too vague as to timeframes to establish when McKenna connected his disability with his employment. "For example, one question asks if McKenna *knows* what caused the problems leading to his disability in 2008. He said he does. Thus, the question can be understood as asking whether McKenna knew, *at the time his deposition was taken in March 2011*, what caused his disability *back in 2008*. His response can be understood in the context of that question." *Id.* at 19.

Lastly the commission observed that even though some evidence supported a finding contrary to the board's, the commission must defer to the board because its finding was reasonable.

The commission concluded that subsection .105(b) did not apply because by its literal terms, it has no application when a claim is timely filed. The board had decided that McKenna's claim was timely filed.