Alaska Workers' Compensation Appeals Commission

Hope Community Resources and
Liberty Northwest Ins. Co.,
Appellants,

vs.

Estate of Veronica Rodriguez, by Larry Henry, personal representative,
Appellee.

Final Decision and Order
Decision No. 086 August 8, 2008

AWCAC Appeal No. 07-009
AWCB Decision No. 07-0054
AWCB Case No. 200405438

Appeal from Alaska Workers' Compensation Board Decision and Order No. 07-0054 issued at Anchorage on March 15, 2007, by southcentral panel members Rosemary Foster, Chair, Patricia A. Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Jeffrey D. Holloway, Holmes Weddle & Barcott P.C., for appellants Hope Community Resources and Liberty Northwest Ins. Co. Larry Henry, Jr., self-represented, the personal representative of the Estate of Veronica Rodriguez, appellee.

Commission proceedings: Motion for extraordinary review and motion for stay filed March 27, 2007, and heard by the commission on April 16, 2007. Alaska Workers' Compensation Appeals Commission Decision No. 041 issued May 16, 2007, determining Board Dec. No. 07-0054 was a final appealable order, permitting appeal to be filed, and staying of order directing Veronica Rodriguez to attend a second independent medical examination. Motion to extend time to file appellee's brief granted by the chair on September 11, 2007. Notice of appellee's default and order to comply with briefing schedule issued November 13, 2007. Oral argument on appeal convened and continued on February 6, 2008. Motion to substitute Estate of Veronica Rodriguez as appellee and accepting Larry Henry, Jr., as personal representative granted on March 17, 2008. Oral argument on appeal presented April 18, 2008. Parties given opportunity to submit written briefing until May 8, 2008. Record closed May 9, 2008.

Commissioners: Stephen T. Hagedorn, Jim Robison, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Appellants appeal a board decision denying their petitions for board review and modification of the reemployment benefits administrator's decision finding the employee eligible for reemployment benefits and ordering Veronica Rodriguez to attend, and appellants to pay for, an independent medical examination under AS 23.30.110(g) and AS 23.30.095(k). Appellants did not seek a stay of payment of on-going reemployment benefits. Ms. Rodriguez, the original appellee, died before argument of the appeal. The commission determines there is no present, live controversy or relief that could be granted by the board if appellants were successful; therefore, the commission dismisses the appeal as moot.

1. Factual background and proceedings.

Veronica Rodriguez, a "home alliance coordinator," reported an abdominal hernia caused by lifting clients to her employer, Hope Community Resources, on February 25, 2004.[1] She returned to her home in Philadelphia, where she was seen March 19, 2004, by Ernest L. Rosato, M.D.[2] He diagnosed a recurrent supraumbilical hernia, which he repaired surgically in April 2004.[3] After the hernia recurred again,[4] Dr. Rosato performed a second surgery in March 2005.[5] During the surgery, he found the employee had an enlarged uterus, with uterine fibroid tumors, that occupied 50% of the abdominal cavity.[6] Dr. Rosato reported Ms. Rodriguez was fully healed from her hernia on August 12, 2005.[7]

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1 R. 0001.

2 R. 0307.

3 *Id.*, R. 0345.

4 R. 0372.

5 R. 0422.

6 R. 0432.

7 R. 0533.

Hope Community Resources paid compensation and medical benefits without an award.[8] Ms. Rodriguez requested a reemployment benefits eligibility evaluation under AS 23.30.041.[9] An employer medical examination on December 6, 2005, by Dr. Braun resulted in a report of his opinion that there was no permanent impairment.[10] In June 2006, Dr. Rosato predicted that Ms. Rodriguez would have a permanent impairment, but he did not provide an impairment rating.[11] Based on Dr. Rosato's prediction, Rodriguez was found eligible for reemployment benefits on July 7, 2006.[12] Ms. Rodriguez selected a plan provider and a plan was developed.[13] Hope Community Resources filed a petition with the board appealing the Administrator's decision finding Ms. Rodriguez eligible.[14] Hope Community Resources also filed a petition for modification of the eligibility determination based on later acquired evidence (an addendum report by Dr. Braun with a rating of zero percent).[15]

a. The hearing before the board.

Hope Community Resources presented no witnesses. It argued that the administrator's decision was arbitrary and capricious for two reasons. First, Dr. Rosato's opinion lacked foundation as he had stated he was not knowledgeable in impairment ratings under the American Medical Association Guides to the Evaluation of Permanent Impairment.[16] Second, the administrator coached the evaluator on what an opinion needed to say to support eligibility and delayed the decision for 3-1/2 months, beyond

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8 R. 0002-08.

9 R. 0567.

10 R. 0542. A later addendum reported a zero impairment rating. R. 0544.

11 R. 0676.

12 R. 0678, 0684.

13 R. 0694, 0702-0737.

14 R. 0029-30. With the employer's consent, reemployment plan development continued during the appeal to the board, so Ms. Rodriguez continued to receive benefits. R. 0692. Appellant did not seek a stay of on-going reemployment benefits during the appeal to the commission.

15 R. 0031-32, 0287.

16 Tr. 13:4-8. (Feb. 7, 2007).

the 60-day time limit, until the evaluator was able to obtain an opinion favorable to Ms. Rodriguez.[17] Hope also argued, citing *Rydwell v. Anchorage School Dist.,*[18] that the administrator's decision should be modified because later evidence demonstrated that Ms. Rodriguez did not have a ratable impairment and she could perform two positions she had prior to her injury.[19] Ms. Rodriguez did not present evidence that Dr. Rosato was qualified to give an opinion on permanent impairment, but she argued that she should not be penalized because her doctor was unqualified to offer an opinion.[20] She argued that Dr. Braun was biased because he and the insurance company were based in Oregon, and, she believed, he worked for the insurance company.[21] She suggested he was biased against her on the basis of her race or national origin because he made an offensive remark while taking her history.[22] Hope Community Resources' attorney objected immediately on the grounds of hearsay, but the board failed to rule on the objection.[23] Ms. Rodriguez objected to Dr. Braun's opinion regarding the role of the uterine fibroid tumors because they had not been detected in her first surgery and his opinion that her hernia was healed because her "stomach's been the same way since I was going to see him and it keeps coming back out."[24]

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[17] Tr. 14:7-23.

[18] 864 P.2d 526, 531 n. 5 (Alaska 1993) ("Thus, at the time of medical stability, an employee receiving reemployment training must (1) qualify for permanent total disability benefits . . .; (2) qualify for PPI benefits under AS 23.30.190 and continue reemployment training; or (3) cease reemployment training because the employee's physical incapacity does not rise to the minimum level of permanent impairment which would warrant benefits under the objective criteria of AS 23.30.190. This result follows logically from the appropriate statutes.").

[19] Tr. 20:22-21:13.

[20] Tr. 30:24-31:12.

[21] Tr. 21:20-24; 22:14-15.

[22] Tr. 23:1-3. ("He made a comment to me that Puerto Rican – when – that when he went to Puerto Rico where his friends, that there are really good whores down there.").

[23] Tr. 23:5-6.

[24] Tr. 24:11-15; 28, 28-24.

b. The board's decision.

The board determined it would consider Hope Community Resources' petition for modification "in light of the whole record, including the new evidence concerning the employee's condition."[25] When reviewing the Administrator's decision,[26] the Board would apply the "abuse of discretion" standard. Based on a finding that Dr. Braun had made an offensive remark to Rodriguez in the course of his examination, the board found that "the obvious evidence of racial bias by Dr. Braun means that the Board will give no weight to Dr. Braun's reports."[27] The board determined that Dr. Rosato's prediction of a permanent impairment was substantial evidence on which the administrator could rely to determine that Rodriguez was eligible for benefits.[28] Based on the preponderance of the evidence in the record, the board found Rodriguez remained eligible for reemployment benefits.[29]

The board ordered that:

> The employer's petition for modification of the RBA Designee's determination is denied and dismissed. The employer's petition to set aside the eligibility determination is denied and dismissed.[30]

After denying and dismissing both petitions, the board found "there is a significant medical dispute between the employee's physician, Dr. Rosato, and the employer's physician, Dr. Braun."[31] The board found the dispute ranged over the areas of

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[25] *Veronica T. Rodriguez v. Hope Community Res. Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0054, 8 (Mar. 15, 2007) (R. Foster, Chair).

[26] The board stated "the instant case involves a petition for modification of an RBA determination under AS 23.30.130 rather than a direct appeal", *Veronica T. Rodriguez,* Bd. Dec. No. 07-0054 at 8, but earlier stated that "the employer filed a petition for review of the July 7, 2006 eligibility determination," *id.* at 6, and the employer "also filed a petition to modify the eligibility determination." *Id*. at 6.

[27] *Veronica T. Rodriguez,* Bd. Dec. No. 07-0054 at 14.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 16.

[31] *Id.* at 15.

causation, compensability, treatment, medical stability, impairment and the employee's degree of impairment. The board found that these disputes were significant and that an SIME was required "to address the issues in this case, including review of any causal connection between hernias and fibroids, as well as expertise in performing impairment ratings."[32] Therefore, the board ordered:

> Workers' Compensation Officer Maria Elena Walsh shall schedule an SIME pursuant to AS 23.30.110(g) and AS 23.30.095 with a physician selected by Ms. Walsh, in accord with the procedure in 8 AAC 45.092(h).
>
> An SIME shall be conducted regarding the nature and extent of the employee's work injury, and determining what, if any, further treatment is reasonable and necessary for the employee's condition, the extent of work-related disability, whether the employee has reached medical stability, if the employee has or is expected to have a ratable PPI, the work-related need for vocational retraining, and any other dispute determined by the Board Designee to be necessary or appropriate to resolve the disputed issues of this claim.
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> The parties shall proceed with the SIME in accord with the process outlined in 8 AAC 45.092(h).[33]

Appellants filed a timely motion for extraordinary review with the commission.

c. Commission proceedings.

After a hearing that Ms. Rodriguez attended telephonically, the commission decided that appellants may appeal the board's order (denying and dismissing their petitions) as a final decision and order of the board under AS 23.30.125.[34] Rodriguez had not filed a claim, and, after dismissal of the employer's petitions, no dispute was before the board. The board's order directing a medical examination left nothing to be done but for the division staff to execute the order and the parties to comply. Therefore, the commission concluded it also was a final appealable order, despite its interlocutory title.

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[32] *Veronica T. Rodriguez,* Bd. Dec. No. 07-0054 at 15.

[33] *Id.* at 16.

[34] *Rodriguez v. Hope Community Resources, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. 041 (May 16, 2007).

The commission issued a briefing schedule for the appeal on July 5, 2007. The schedule required appellee to file a brief by September 12, 2007. Shortly before the date the brief was due, Ms. Rodriguez requested an extension of time due to illness,[35] which the chair granted. After no brief arrived, the chair issued a notice of default on November 13, 2007, giving Ms. Rodriguez until December 4, 2007, to file a brief, and informing her that the commission would schedule oral argument on the appeal if it had not received a brief by that date. When no brief was received, the commission scheduled oral argument for February 6, 2008.

Unknown to the commission, Ms. Rodriguez was gravely ill, and died on December 17, 2007. On the day of hearing, the commission telephoned the number provided by Ms. Rodriguez for her first hearing. Ms. Rodriguez's sister responded; she told the commission Ms. Rodriguez had died and that her son, Larry Henry, Jr., was handling her affairs. The commission continued the hearing.[36] Mr. Henry filed a motion to substitute the Estate of Veronica Rodriguez and allow him to act as personal representative of the Estate in the appeal.[37] The commission granted the motion,[38] and rescheduled oral argument for April 18, 2008.[39] The commission clerk sent Mr. Henry a copy of the commission file.

Mr. Henry appeared telephonically at oral argument. At the end of the hearing, Mr. Henry requested a continuance so that he could get an attorney. The commission allowed the record to remain open until May 8, 2008, to allow Mr. Henry to file a written

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[35] Ms. Rodriguez had lymphoma, or cancer of the lymph tissues, of which there are different types. *See* Dorland's Illus. Medical Dictionary, 1079-80 (30th ed. 2003).

[36] Order Continuing Oral Argument, Feb. 7, 2008.

[37] Appellee's Mot. to Accept Substitution, etc., filed Mar. 17, 2008.

[38] Order on Mot., Mar. 17, 2008.

[39] Notice of Hearing Oral Argument, Mar. 21, 2008.

argument and appellants to respond. Nothing was received and the commission closed the record May 9, 2008. [40]

2. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.[41] The commission does not consider evidence that was not in the board record when the board's decision was made.[42] A board determination of the credibility of testimony of a witness who appears before the board is binding upon the commission.[43]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[44] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[45] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers'

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[40] On May 6, 2008, Mr. Henry notified the commission clerk by electronic mail that he had asked attorney Michael Jensen to look at the case. He also asked the clerk to make a copy of Ms. Rodriguez's medical records for Mr. Jensen. The clerk contacted Mr. Jensen's office. The clerk informed him that, based on the contact from Mr. Henry, the commission would allow him to review the file, but requested that he file a limited appearance by May 9, 2008. Mr. Jensen informed the commission clerk that he had reviewed the adjuster's file and decided not to represent the Estate. The commission thereupon closed the record.

[41] AS 23.30.128(b).

[42] AS 23.30.128(a).

[43] AS 23.30.128(b).

[44] AS 23.30.128(b).

[45] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

compensation[46] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[47]

3. Discussion.

Appellants urge the commission to reverse the board's decision for three reasons. First, appellants argue the board erred by not reversing the administrator's decision as arbitrary and capricious. The administrator did not act expeditiously to decide the request for eligibility based on the evidence, but continued the matter for three months in order to obtain an opinion in the employee's favor. Second, appellants argue, the board, acting on the petition to modify the administrator's decision, did not have substantial evidence to support its decision and improperly discarded Dr. Braun's opinion. Third, appellants argue, the board, having dismissed the employer's petitions, had no authority to order the employee to attend, and the employer to pay for, an independent medical examination when there was no claim or petition before the board. Appellants concede that there is no possibility that they will be compelled to pay for a medical evaluation or future vocational reemployment benefits, but they contended at oral argument that the errors of the board raise such important issues that the commission should decide the appeal.[48]

Appellants' claims of error on appeal are moot.

The commission may "review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a

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[46] AS 23.30.007, 008(a). *See also Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[47] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[48] According to appellants' statements at oral argument, Ms. Rodriguez's reemployment benefits were suspended May 10, 2007, because she dropped out of the program, did not attend classes, and did not maintain contact with the reemployment benefits provider. She did not obtain a rating of permanent partial impairment. She did not file a claim for permanent partial disability compensation or resumption of her reemployment benefits. There is no suggestion that her death from lymphoma was the result of her employment. Appellants suggested there is a remote possibility of survival of a claim for some benefits, such as permanent partial impairment, but conceded those claims had not been filed.

compensation claim or petition."[49] The commission is the "final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission."[50] The commission's authority is limited to those board actions that are appealed to it. In addition, the commission has held that

> the parties to an appeal must have a recognized interest in the outcome of the appeal. This requirement serves as a check on the commission's exercise of its power of review - it prevents the commission from giving general advisory opinions and thereby intermeddling in the board's power to approve, and the department's authority to adopt, regulations that interpret and enforce the workers' compensation statutes.[51]

An appeal is moot when "a decision on the issue [on appeal] is no longer relevant to resolving the litigation, or where it has lost its character as a 'present, live controversy.'"[52] This appeal came before the commission as a challenge to the board's refusal to reverse the administrator's decision Ms. Rodriguez was eligible for reemployment benefits, or to terminate her receipt of benefits. Upon Ms. Rodriguez's death, appellants' liability for reemployment benefits under the appealed board decision ceased, and there is no pending claim, or appeal of a board order awarding, reemployment benefits after May 10, 2007. Appellants have no claim against appellee

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[49] AS 23.30.128(b).

[50] AS 23.30.008(a).

[51] *Pacific Log & Lumber v. Carroll*, 2007 WL 1965954, Alaska Workers' Comp. App. Comm'n Dec. No. 047, 6 (June 29, 2007). *See also BP Exploration Alaska, Inc. v. Stefano*, 2008 WL 2065075, Alaska Workers' Comp. App. Comm'n Decision No. 076, 19 (May 06, 2008); *Kelly v. State, Dep't of Corrections*, 2007 WL 2121695, Alaska Workers' Comp. App. Comm'n Dec. No. 049, 27 (July 13, 2007).

[52] *Maness v. Daily,* 184 P.3d 1, 8 (Alaska 2008) (quoting *Clark v. State, Dep't of Corr.*, 156 P.3d 384, 387 (Alaska 2007) (quoting *Municipality of Anchorage v. Baxley*, 946 P.2d 894, 899 (Alaska 1997)). This rule has also been stated as "A case is moot if the party bringing the action would not be entitled to any relief even if they prevail." *Maynard v. State Farm Mutual Auto. Ins. Co.*, 902 P.2d 1328, 1329 n.2 (Alaska 1995). *See also Nickels v. Napolilli*, 29 P.3d 242, 254 (Alaska 2001) (holding that once the plaintiff had "no tenable claim at law" the court properly dismissed her remaining challenges to the merits of any administrative claim as moot).

for benefits paid under the board's order.[53] The board's order directing Ms. Rodriguez to attend and appellants to pay for an independent medical exam cannot be enforced. There is no present controversy between the parties to the appeal that the commission's ruling on this appeal could resolve. Therefore, the commission concludes the claims of error on appeal are moot, and the appeal should be dismissed.

Appellants suggest that the issue presented is so important that the commission should make an exception to the mootness doctrine and reverse the board. The Alaska Supreme Court recognized a "public interest exception" to the mootness doctrine where the Court "will ... consider a question [that] otherwise [is] moot."[54] When determining if it should apply the exception, the Court said,

> [w]e weigh three factors in deciding whether to apply the public interest exception: (1) whether the disputed issues are capable of repetition, (2) whether the mootness doctrine would, if applied, repeatedly prevent review of the issues, *and* (3) whether the issues are so important to the public interest as to warrant overriding the mootness doctrine.[55]

The capability of repetition refers not to the possibility that the issue may appear in another case, but whether it will arise again between the same parties.[56]

Appellants present strong claims of error,[57] but there is no possibility that the board will make such an order in this case again. Assuming, for the sake of argument,

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[53] *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991).

[54] *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 380- 81 (Alaska 2007).

[55] *Id.* (emphasis added).

[56] *Maness*, 184 P.2d at 8.

[57] The points raised by appellants required that the commission decide (1) if the board erred by directing the employee to attend an independent medical examination when there was no legal dispute before the board and (2) if the board erred in admitting over objection, and relying on, evidence of bias in making a credibility judgment regarding Dr. Braun's report without requisite foundation or findings. The first issue concerns whether (1) a conflict in medical evidence or the board's unanswered questions concerning the medical evidence establish a medical dispute within the meaning of AS 23.30.095(k) in the absence of a legal dispute and (2) AS 23.30.110(g) authorizes the board to order an examination in the absence of a claim

that the "public interest exception" could be applied by the commission, appellants do not meet the test for its application in this case. Even if the commission found that the board erred, reversal of the board's decision would not result in further relief to appellants.[58]

4. Conclusion.

The commission concludes that appellants' claims of board error are moot. Therefore, the appeal is DISMISSED without a decision on the merits of the appeal.

Date: *August 8, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

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for compensation. The second issue for the commission concerns the principle, embodied in Alaska Rule of Evidence 613, that evidence of bias requires the person offering the evidence to lay a foundation by affording the witness charged with bias the opportunity to admit, explain or deny the bias before the evidence of bias may be admitted. *See Moss v. State*, 620 P.2d 674, 676 n.3 (Alaska 1980). This appeal did not present a case in which the appellant failed to demonstrate that admission of the evidence was prejudicial error, *See Geister v. Kid's Corps, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 045, 22 (June 6, 2007), as the board clearly relied on the evidence of bias to reject Dr. Braun's report. Instead, the board's reliance on the evidence of bias raises another question: whether the board's failure (to identify how witness bias affected the report and the impairment rating so that they were less persuasive) was reversible error. *See Anchorage Nissan, Inc. v. State,* 941 P.2d 1229, 1238-39 (Alaska 1997); *Snyder v. Foote*, 822 P.2d 1353, 1359 (Alaska 1991).

[58] *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*, 48 P.3d 1165, 1168 (Alaska 2002) (holding the appeal moot because "the union has already been given the remedy it seeks, and we cannot give it any further relief even if we agree with the union's legal argument.").

APPEAL PROCEDURES

This is a final commission decision on this appeal from the board's decision and order. This decision becomes effective when it is mailed or otherwise distributed to the parties, unless proceedings to reconsider it or seek Supreme Court review are instituted. The effect of this decision is to dismiss the appeal because the issues in the appeal are moot.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the distribution (mailing) of this final decision and 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. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed 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).

If you wish to appeal 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

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the 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 the Final Decision, Alaska Workers' Compensation Appeals Commission Dec. No. 086, in the matter of *Hope Community Resources vs. Rodriguez*, AWCAC Appeal No. 07-009, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *8th* day of August, 2008.

Signed
J. Ramsey, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No.07-009 was mailed on *8/8/08* to Larry Henry, Jr., personal rep. of the Estate of Veronica Rodriguez (certified) and Holloway at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, & Holloway.

Signed *8/8/08*
J. Ramsey, Deputy Clerk Date