Alaska Workers' Compensation Appeals Commission

Fairbanks Memorial Hospital and
Harbor Adjustment Service Co.,
Appellants,

vs.

State of Alaska, Second Injury Fund,
Appellee.

Final Decision
Decision No. 103 March 18, 2009

AWCAC Appeal No. 08-019
AWCB Decision No. 08-0100
AWCB Case No. 200313605

Appeal from Alaska Workers' Compensation Board Decision No. 08-0100 issued May 28, 2008, by northern panel members Fred G. Brown, Chair, and Damian Thomas, Member for Labor, on reconsideration of Board Decision No. 08-0088, issued May 2, 2008 by northern panel members Fred G. Brown, Chair, and Damian Thomas, Member for Labor.

Appearances: Zane D. Wilson, Cook, Schumann & Groseclose, Inc., for appellants, Fairbanks Memorial Hospital and Harbor Adjustment Service Co. Talis J. Colberg, Attorney General and Rachel L. Witty, Assistant Attorney General, for appellee, State of Alaska, Second Injury Fund.

Commission Proceedings: Appeal filed June 27, 2008. Notice of record deficiency and reopening of the record given December 17, 2008. Oral argument presented December 18, 2008. Supplementation of the record by the board received and the record closed on December 23, 2008.

Commissioners: David Richards, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

This is an appeal of a decision the board issued on reconsideration. In its first decision, the board found the Second Injury Fund (hereafter referred to as "the Fund") was liable for reimbursement of compensation Fairbanks Memorial Hospital ("the Hospital) paid in excess of 104 weeks to Joan O'Lone, a nurse, for an injury she

suffered on August 6, 2003.[1] The board decision states that the notice of possible claim against the Fund was filed within 100 weeks[2] and "is not denied as untimely."[3] In a petition for reconsideration, the Fund urged that the reimbursement award should be reversed because the board erred in finding the notice was filed on time.[4] The board decided it had overlooked 8 AAC 45.020(c).[5] The board found the notice was mailed on July 7, 2005, but it was not filed until it was received by the Fund on July 13, 2005,

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[1] *Joan M. O'Lone v. Fairbanks Mem'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 08-0083, 7 (May 7, 2008) (F. Brown, Chair; D. Thomas, Memb. for Labor).

[2] AS 23.30.205 provides in part:

> (e) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.
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> (f) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier have knowledge of the injury or death.

[3] Bd. Dec. No. 08-0083 at 5.

[4] R. 1108-9.

[5] *Joan M. O'Lone v. Fairbanks Mem'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 08-0100, 7 (May 28, 2008) (F. Brown, Chair; D. Thomas, Memb. for Labor). 8 Alaska Admin. Code 45.020 provides:

> **Transaction of Business**. (a) The division will transact business at its offices in Juneau, Anchorage and Fairbanks during the hours prescribed by law.
>
> (b) The board will determine the time and place within the State of Alaska for holding sessions of the board and conducting hearings.
>
> (c) Papers and documents will be filed at the division's office or at any open hearing as of the date of receipt.

more than 100 weeks "after the qualifying injury."[6] The board modified its decision to reflect denial of the Hospital's petition for reimbursement.[7] The Hospital appeals.

The appellant argues that the appellee admitted that timely notice was given in the answer filed to the petition for reimbursement; therefore, the appellee waived a defense of untimeliness by failing to seek amendment of its answer.[8] Without adequate notice to the appellant or amending its answer, the appellant argues, the appellant lacked adequate notice that the timeliness would be considered by the board in the first decision; therefore, the board erred in granting reconsideration on a question that was not in issue.[9] Finally, the appellant contends the board erred in starting the 100-week notice period on August 6, 2003, the date O'Lone was injured.[10] The appellee contends that the appellant had an adequate opportunity to litigate its claim for reimbursement, which is all due process requires.[11] The appellee argues that by not complaining of the Fund's hearing brief to the board, the Hospital waived any objection to the board considering the issue.[12] Finally, the appellee argues that the board's failure to require amendment of the Fund's answer was harmless error, since the appellant could have objected and failed to do so.[13] Therefore, the appellee asserts, the appellant suffered no prejudice due to the board's failure to require appellee to amend its answer.[14]

The parties' contentions require the commission to decide if the question of timeliness was properly before the board, and, if it was, whether the board erred in

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6 Bd. Dec. No. 08-0100 at 6.

7 Bd. Dec. 08-0100 at 7.

8 Appellant's Br. at 11, Appellant's Reply Br. at 5. Appellant also argued that the appellee is estopped to assert appellant waived any rights, Appellant's Reply Br. at 3.

9 Appellant's Br. at 7.

10 *Id.* at 14.

11 Appellee's Br. at 12.

12 *Id.* at 9, 10.

13 *Id.* Br. at 9.

14 *Id.* at 7.

failing to decide when the 100-week period began. The parties' arguments invite the commission to revisit its decision in *North Slope Bor. v. Wood.*[15]

The commission concludes that the Fund admitted unequivocally in a written answer that the notice was timely. If the board wishes to consider a factual issue previously taken out of contention by unamended admission, it must give notice to the parties. The commission also concludes that the core issue of timeliness of notice to the Fund was not properly analyzed by the board. The board assumed, contrary to the Supreme Court's decision in *Second Injury Fund v. Arctic Bowl*[16] and the commission's decision in *North Slope Bor. v. Wood,* that the date the employee is injured is the date of notice of injury for Fund purposes. There is no evidence in the record that the appellant had notice of an injury, within meaning of *Arctic Bowl*, on August 6, 2003. The board's failure to apply controlling precedent requires reversal.

1. Factual background and board proceedings.

Joan O'Lone, a nurse employed by Fairbanks Memorial Hospital, injured her back restraining a patient on August 6, 2003.[17] Before this injury, O'Lone had undergone surgery for a herniated intervertebral disc in 1993 and developed a multitude of problems with her back, including chronic pain, sciatica, postoperative fibrosis, and other degenerative changes.

O'Lone gave the Hospital a report of occupational injury on August 6, 2003. On September 2, 2003, Dr. Vrablik filed a Physician's Report describing complaints of "Back Spasm R, R Leg pain and buttock pain."[18] In an attached narrative, he reported:

> Joan O'Lone presents for evaluation. She continues with back and leg pain, right worse than the left. She has had an epidural by Dr. Stinson. She is going to physical therapy. She's had an MRI which does not show any recurrent disc, but does show

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15 Alaska Workers' Comp. App. Comm'n Dec. No. 048, 11 (July 13, 2007).

16 *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 594 (Alaska, 1996).

17 *O'Lone v. Fairbanks Mem'l Hosp.*, Alaska Workers' Comp. Bd. Dec. No. 05-0335 (Dec. 20, 2005) (W. Walters, Chair; C. Johansen, Memb. for Indus.).

18 R. 0432.

> substantial epidural fibrosis about L5-S1. Today, patient has negative straight leg raising. Reflexes are symmetrical. The knee is depressed at the ankles. The patient is tender in the posterior superior iliac spine, bilaterally in the buttocks, over the right greater trochanter. IMPRESSION: Back pain secondary to epidural fibrosis. RECOMMEND: Percocet 10/325, #40 tablets. Valium 5 mg, one or two q.4-6h. p.r.n., #30 tablets. Neurontin 300, one t.i.d., #100 tablets. Motrin 800, one t.i.d., #100 tablets. See me in about 3-4 weeks. Call if pain worsens.[19]

On August 25, 2003, Dr. Lawrence Stinson, to whom O'Lone was referred for pain treatment, recorded that "we discussed that it may not be possible for her to return to an unrestricted status back to working as a nurse. This is her goal however, and we will continue to work towards that with physical therapy."[20] O'Lone was paid temporary disability compensation, and eventually returned to part-time work.

A dispute arose between the Hospital and O'Lone over the reasonableness of particular medical treatment -- a spinal cord implant. The board heard O'Lone's claim for the implant on November 16, 2005. In order to resolve the dispute, the board was required to decide if O'Lone's back injury in August 2003 was the cause of need for additional, more serious medical treatment and her continuing disability. The board rejected the Hospital's argument that the August 2003 injury was not a substantial factor in the continuing need for medical treatment, the spinal cord implant surgery, and O'Lone's continuing disability in a decision issued December 20, 2005.[21]

The Hospital mailed the Fund a Notice of Possible Claim on July 7, 2005. It was stamped received on July 13, 2005, by the Fund office in Juneau.[22] On May 17, 2007, the Hospital petitioned the board to join the Fund and claimed reimbursement for

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19 R. 0433.

20 R. 0511. The copy of the medical report does not indicate when the employer received it.

21 *Id.* at 14.

22 R. 0031. July 13, 2005, was a Wednesday.

compensation paid in excess of 104 weeks.[23] The Fund responded with an answer by its administrator, Michael Monagle, admitting that O'Lone suffered an injury to her back in her employment, that O'Lone had a qualifying pre-existing condition, that the Hospital had knowledge of the condition, that the Hospital had paid 104 weeks of compensation; and, that "the petitioner filed a notice of possible claim against the Second Injury Fund within 100 weeks of the August 6, 2003, date of injury."[24] It disputed that the August 2003 injury resulted in a "disability substantially greater than either condition alone." It also disputed that O'Lone's continuing disability was the result of "the combined effects of her pre-existing condition with her industrial accident of August 6, 2003." The Fund did not assert, as an affirmative defense, that the notice was too late. It did, however, reserve the right to assert further defenses "that may become known during the course of discovery."[25]

On August 30, 2007, the Hospital filed an Affidavit of Readiness for Hearing, requesting a "Hearing on the Record."[26] The Fund objected to setting the matter on for hearing because the Fund "disputes the compensability of this claim and has not had adequate time for discovery" and the Fund "has submitted a request for representation to the AG's office, and is awaiting assignment."[27] A prehearing conference was attended by counsel for the Fund and for the Hospital on November 28, 2007. The

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[23] R. 1129. The original filed Petition and Answer was not in the record supplied by the board to the commission. After giving notice of the deficiency, the board supplied a copy of the Petition which does not have the board's stamp.

[24] R. 1243-44. See note 23, above.

[25] R. 1244.

[26] R. 1246. A "hearing on the record" means that the board decides the petition on the written record, without oral argument or an evidentiary hearing.

[27] R. 1247-48. Assistant Attorney General Larry McKinstry entered an appearance for the Fund on Sept. 19, 2007. R. 0348.

officer's summary reflects that the parties "stipulated to set this matter for hearing on March 27, 2008 pursuant to regulations."[28]

The Hospital filed its hearing brief with the board on Friday, March 21, 2008, five working days before the scheduled hearing.[29] On Monday, March 24, 2008, less than five working days before the hearing, the Fund filed its brief.[30] The board issued a decision May 7, 2008, granting the Hospital's petition.[31]

The Fund moved for reconsideration May 15, 2008, arguing that filing is only effective on the date of receipt.[32] Because the Notice was filed 100 weeks and 6 days after O'Lone's injury on August 6, 2003, the Fund argued the Notice was not filed on time, contrary to the board's decision. The Fund argued, "Given that the Board has found that the Notice required to be filed with the SIF within 100 weeks of the qualifying injury was not received by the SIF until 6 days beyond the statutory deadline, the Notice was untimely."[33] The Hospital opposed the petition May 19, 2008, arguing that the Fund filed an answer admitting that the notice was timely received, that the Hospital had no notice of any issue but the "combined effects" issue, and that the Fund was barred from disputing timeliness without amending the answer.[34] The board reversed its previous decision, and denied the petition for reimbursement.[35] After an unsuccessful attempt at reconsideration, the Hospital appealed.

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[28] R. 1253. "Pursuant to regulations" is a catch phrase denoting that the witness lists, briefs, and evidence will be filed in accordance with regulations at 8 Alaska Admin. Code 45.112, .114, and .120, instead of an agreed schedule.

[29] R. 0350-0408.

[30] R. 0409. The Fund mailed its brief on Mar. 21, 2008, R. 0421, but, as the Fund argued later to the board, filing is not accomplished by mailing.

[31] R. 0423-0430.

[32] R. 1107.

[33] R. 1108-09.

[34] R. 1111-12.

[35] R. 1098-1106.

2. Standard of Review.

A board determination of the credibility of a witness who testifies before the board is binding on the commission.[36] "The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."[37] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[38]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Alaska Workers' Compensation Act.[39] 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.[40] If a provision of the Act, or regulation, has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation[41] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[42]

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[36] AS 23.30.128(b).

[37] AS 23.30.128(b).

[38] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citing AS 23.30.122).

[39] *Id*.

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

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

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

3. Discussion.

a. The timeliness of notice of a possible claim was not properly before the board for decision.

In order to obtain reimbursement from the Second Injury Fund, an employer must file a Notice of Possible Claim no more than 100 weeks after the employer has *knowledge* of the injury.[43] The appellant argues that in paragraph five of the Fund's answer to appellant's claim for reimbursement, the Fund made a "judicial admission" that the Hospital's Notice was timely. Paragraph five of the Fund's answer states: "The SIF acknowledges that the petitioner filed a notice of possible claim against the Second Injury Fund within 100 weeks of the August 6, 2003 date of injury."[44]

8 Alaska Admin. Code 45.050(c)(3)(B) requires a party answering a claim or petition to state in the answer if there is any reason that the claim is "otherwise barred by law or equity."[45] Because failure to file a Notice within 100 weeks of knowledge of

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[43] AS 23.30.205(e) provides:

> An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death.

8 Alaska Admin. Code 45.186 provides in part:

> (a) In order to satisfy the notice provisions of AS 23.30.205 (f) an employer or carrier shall, no later than 100 weeks after receipt of knowledge of the injury or death, file form 07-6110 with the board and serve a copy of the form upon all interested parties in accordance with 8 AAC 45.060.

The regulation has not been updated following the Revisor's 2008 relettering of AS 23.30.205(d) as AS 23.30.205(f), and former subsection (f) relettered as (e).

[44] R. 0356.

[45] 8 Alaska Admin. Code 45.050(c) provides in pertinent part:

> (c) Answers. (1) An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A default will not be entered for failure to answer, but, unless an answer is timely filed, statements

the injury bars reimbursement as a matter of law, the Fund's answer was required to assert the failure to file a timely Notice of Possible Claim. Instead, the answer "acknowledges that the petitioner filed a notice of possible claim against the Second Injury Fund within 100 weeks of the August 6, 2003 date of injury."

This statement is couched as a statement of fact: the petitioner filed a notice. It does not recite that the employer filed a notice of possible claim within 100 weeks of employer *receipt of knowledge of* the injury, as 8 Alaska Admin. Code 45.186(a) requires. But, because the answer states that the notice was filed "within 100 weeks of the August 6, 2003 date of injury" it clearly conveys that the Fund admits that notice was given within 100 weeks of the earliest possible date the employer could have had knowledge of the injury. The Fund was required to assert in its answer if the claim for reimbursement "was otherwise barred by law," but it did not assert that the claim was barred because the employer failed to file notice within 100 weeks of employer knowledge. Together, the statement in paragraph five, coupled with the absence of an assertion that the claim for reimbursement was barred by law under AS 23.30.205(e), conveys a clear, precise impression to the reader that the Fund deliberately chose not

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> made in the claim will be deemed admitted. The failure of a party to deny a fact alleged in a claim does not preclude the board from requiring proof of the fact.
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> (2) An answer to a petition must be filed within 20 days after the date of service of the petition and must be served upon all parties.
>
> (3) An answer must be simple in form and language. An answer must state briefly and clearly the admitted claims and the disputed claims so that a lay person knows what proof will be required at the hearing and, when applicable, state
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> (A) any reason why the claim or dispute cannot be heard completely at the first hearing;
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> (B) whether the claim is barred under AS 23.30.022 , 23.30.100, 23.30.105, 23.30.110, or otherwise barred by law or equity; . . .
> .

to dispute the timeliness of the employer's Notice and to admit a fact.[46] The commission concludes the Fund admitted timely notice of the possible claim.

The Fund concedes as much in its brief on appeal: "In the answer, the administrator stated that the notice of claim had been timely filed . . . ."[47] The answer, it asserts, "was based on whatever information had been provided with the petition,"[48] but appellee does not assert it was misled. Instead, appellee concedes that appellant "was surprised by the raising of the issue of timeliness in the SIF [hearing] brief in light of the earlier answer."[49] It concedes that a "request to amend the answer could have, and perhaps should have, accompanied the SIF brief in this matter," but asserts that its failure to do so did not "deprive the board of the ability or responsibility to address . . . the statutory requirements for reimbursement."[50]

The appellee asserts that the board's failure to require an amendment to its answer and consideration of the timeliness issue was "harmless error" because the Hospital could have objected after the Fund's brief was filed, but did not do so. The appellee's argument rests on the principle that primary responsibility for appellee's compliance with regulations and agreements it makes rests with the board – that is, that unless the board acts to prevent or sanction a party's non-compliance, a party's failures to abide by stipulations or follow the regulations have no adverse consequence. The appellee's argument that appellant's failure to take extraordinary measures to object to the Fund's late-filed brief excuses the Fund's failure to amend its answer and attempts to shift responsibility to avoid the consequences of non-compliance to the opposing party.

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[46] *Crosby v. Hummell,* 63 P.3d 1022, 1027-28 (Alaska 2003) ("To qualify as a judicial admission, a party's answer must be a clear, deliberate, and unequivocal statement of fact.").

[47] Appellee's Br. 1.

[48] Id. at 7.

[49] Id. at 12.

[50] Id. at 7.

The commission holds that the Hospital's failure to take extraordinary measures to object to the late-filed brief does not excuse the Fund's failure to amend its answer. 8 Alaska Admin. Code 45.050(c)(3)(B) imposes an affirmative obligation to disclose a defense based on a legal or equitable bar in the answer. The board's regulations permit liberal amendment "upon such terms as the board . . . directs."[51] Thus, the board's direction was required to amend the Fund's position regarding the timeliness of the Hospital's notice. Despite the Fund's stipulation it would file its brief "no later than five working days before the hearing,"[52] it gave its first notice to the board of a significant change in its position, placed a new factual issue in dispute and asserted a claim bar only two working days before the hearing. Unless the board excuses the

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[51] 8 Alaska Admin. Code 45.050(e) provides:

> **Amendments.** A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if, additionally,
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> > (1) within the period provided by AS 23.30.105 for filing a claim, the party to be brought in by amendment has received, under AS 23.30.100 , such notice of the injury that the party will not be prejudiced in defending the claim; and
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> > (2) the party to be joined by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

[52] R. 1253. 8 Alaska Admin. Code 45.112 provides in pertinent part:

> Legal Memoranda. Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must
>
> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established; . . .

No finding of unusual or extenuating circumstances was made.

failure under 8 Alaska Admin. Code 45.195,[53] a hearing brief filed late may not be considered by the board at hearing.[54]

The commission has held that the parties must have notice of the issues that will be decided by the board in order to adequately exercise their rights to "be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered."[55] The Supreme Court held that the board's authority under AS 23.30.110(a) to hear and determine "all questions in respect to the claim" is "limited to the questions raised by the parties *or by the agency upon notice duly given to the parties*."[56] On the subject of lack of notice of the issues to be decided by the board, the Supreme Court more recently said in *Groom v. State, Dep't of Trans.*,

> We have previously held that the crux of due process is the opportunity to be heard and the right to adequately represent one's interests. While the actual content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so that they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." We have also held that defects in administrative notice may be

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[53] 8 Alaska Admin. Code 45.195 provides:

> A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

[54] 8 Alaska Admin. Code 45.070(i) states, "At hearing, the board will consider a legal memorandum only if it is in accordance with 8 AAC 45.114."

[55] AS 23.30.001(4). *See Schouten v. Alaska Indus. Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094, 9 (Dec. 5, 2008); *Wolford v. Hansen*, Alaska Workers' Comp. App. Comm'n Dec. No. 030, 12, 2007 WL 416950 *6 (Feb. 2, 2007).

[56] *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981) (emphasis added).

> cured by other evidence that the parties knew what the proceedings would entail.[57]

While the board may require proof of a fact notwithstanding the failure of a party to *deny a fact* alleged in a claim,[58] *an affirmative admission to the fact* in an answer "remove[s] the fact from contention."[59] By the time of the prehearing conference in November 2007, the appellee had not amended the answer to put the factual issue back in contention. The prehearing summary reflects no amendment of the answer.[60] Therefore, the board could not decide a factual issue that was not in dispute without giving adequate notice to the parties, unless the deficiency in notice was cured by other evidence at hearing that the parties knew what issues were disputed. In this case, the appellee concedes that the appellant "was surprised" by the Fund's hearing brief – that the appellant did not have actual knowledge the Fund would contest when the Hospital filed notice at hearing. The commission concludes that the board erred in deciding whether or not the Hospital filed a timely Notice of Possible Claim against the Fund without giving the parties adequate notice.

b. On reconsideration, the board did not follow controlling authority in determining the date the 100-week notice period expired.

Following the board's decision awarding reimbursement, the Fund filed for reconsideration of the factual finding that the claim was "filed" within 100 weeks of the

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[57] 169 P.3d 626, 635 (Alaska 2007) (footnotes omitted).

[58] 8 Alaska Admin. Code 45.050(c)(1).

[59] *See Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 341 (Alaska 2005) *quoting* 30B Wright & Miller, *Federal Practice & Procedure* § 7026 (2004) ("Judicial admissions are not evidence at all but rather have the effect of withdrawing a fact from contention. Included within this category are admissions in the pleadings in the case . . . . Ordinary evidentiary admissions, on the other hand, may be controverted or explained by the party. Within this category fall the pleadings in another case[.]").

[60] 8 Alaska Admin. Code 45.050(g) ("Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.").

qualifying injury. The Hospital opposed, arguing the Fund could not raise an issue on reconsideration that was not properly raised below. Without comment on the Hospital's argument, the board decided that the Hospital's notice was late because it was filed more than 100 weeks after August 6, 2003, the day O'Lone was injured. On appeal, the appellant asserts the board's decision reflects plain error in its application of the law regarding when the 100-week notice period begins to run.

In *Second Injury Fund v. Arctic Bowl*, the Supreme Court held that, with reference to "knowledge of an injury" in AS 23.30.205(e), an "'injury' does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met . . . The mere knowledge that an injury has occurred does not suffice to trigger the 100-week notice period."[61] In *North Slope Bor. v. Wood*, the commission held that the board must determine the "start date" of the 100-week notice period before it finds that the period has expired without the employer giving notice.[62] The commission said, "Because an `injury' for SIF purposes occurs when the combined effects test is met, the 100 weeks that mark the outside limit for notice must begin after the combined effects test is met and after the employer's knowledge of the injury."[63] In this case, perhaps persuaded by the Fund's assertion that "the Board has found that the Notice required to be filed with the SIF within 100 weeks *of the qualifying injury* was not received by the SIF until 6 days beyond the statutory deadline,"[64] the board counted the 100 weeks from the date O'Lone was injured (as the "qualifying injury") instead of following the Supreme Court's interpretation of AS 23.30.205 in *Arctic Bowl* and this commission's guidance.

In *North Slope Bor. v. Wood,* the commission described how the board should approach the 100-week notice period:

> The date of knowledge of an injury for SIF purposes and the date of a possible claim may be the same in many cases. In this

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61 928 P.2d 590, 594 (Alaska 1996).

62 Alaska Workers' Comp. App. Comm'n Dec. No. 048, 10 (Jul. 13, 2007).

63 *Id.* at 7.

64 Pet. for Reconsideration, 3.

> case, the Borough's claim is based on the combined effect of the pre-existing lumbar spine arthritis and later the neck and shoulder injury. If the Borough had immediate knowledge of the combined effects, then the 100-week period required by AS 23.30.205(f) ran from the time at which the "combined effects" test is met, concurrent with the existence of a possible claim. The notice period ends no later than 100 weeks from the time the Borough had such knowledge. However, if a possible claim exists but the Borough had no knowledge of an injury for SIF purposes (no knowledge that the combined effects test is met), the Borough's obligation to give notice began with the existence of the possible claim but its opportunity to give notice ends 100 weeks after it knew of the injury for SIF purposes.[65]

Because the board made no finding of fact that the Hospital had *immediate* knowledge of the combined effects test being met, it was error to begin running the 100-week notice period from the date the employee was injured.

The appellee cites no evidence in the record that, as a matter of law, must have or could have informed the employer that the combined effects of a pre-existing back injury, which had not resulted in disability, and the employee's August 6, 2003, injury, would result in substantially greater disability than the later injury alone would do. The appellee asserted that because the injury took place in the hospital, O'Lone was immediately hospitalized, and her physician ordered an MRI, the Hospital knew that her physician regarded it as a serious injury. Therefore, appellee argued, the Hospital should be charged with notice of a "possible claim."

The commission will not weigh medical evidence, which is the province of the board. However, whether evidence is substantial evidence, on which a reasonable mind might rely to establish a fact, is a question of law. The commission reviewed the record to determine if there is evidence that might support a finding by the board that the employer was advised that O'Lone's August 6, 2003 injury would result in "substantially greater disability." A careful review of the record before the board did not reveal medical records or other evidence received by the appellant before August 14, 2003, (100 weeks before the notice was filed) that could be interpreted by a reasonable mind

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[65] App. Comm'n Dec. No. 048 at 10.

as informing the Hospital that O'Lone may suffer "substantially greater disability" following her August 2003 injury than she would have done if the 2003 injury had not combined with the effects of previous surgery for a herniated disc. Dr. Vrablik's August 19, 2003 report describes her condition as "back pain secondary to epidural fibrosis," and his physician's report of September 2, 2003, does not predict additional permanent disability. The *earliest* possible indication that O'Lone would suffer "substantially greater disability" is contained in Dr. Stinson's August 25, 2003, progress note that "we discussed it may not be possible for her to return on an unrestricted status back to working as a nurse." The record does not indicate when Dr. Stinson's record was received by the employer, but it could not have been received before it was dictated on August 25, 2003. Therefore, because the record lacks substantial evidence to support a finding that the employer knew the injury would result in substantially greater disability more than 100 weeks before the notice was filed, the board could not find that the employer's notice of possible claim was untimely.

4. Conclusion.

Because the board's analysis of the notice issue on reconsideration failed to apply controlling precedent, and the record available to the board does not contain substantial evidence on which the board could base a finding that, before August 25, 2003, the employer knew, or could have known, that O'Lone would suffer "substantially greater disability" as a result of the combined effects of the August 2003 injury and her pre-existing condition than she would have suffered due to the August 2003 injury alone, the commission REVERSES the board's decision on reconsideration. The board's May 7, 2008, decision granting reimbursement stands.[66]

[66] The Fund did not cross-appeal the board's May 7, 2008, decision.

The commission's decision fully resolves the appeal, so the commission does not address other arguments raised by the parties.

Date: *18 Mar. 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal from Alaska Workers' Compensation Board Decision No. 08-100 denying Fairbanks Memorial Hospital reimbursement by the Second Injury Fund on reconsideration of Alaska Workers' Compensation Board Decision No. 08-0088. The effect of this decision is to reverse Board Decision No. 08-0100 and reinstate Board Decision No. 08-0088, granting reimbursement. The commission has not retained jurisdiction.

The commission reversed (disapproved) Board Decision No. 08-0100. This is a final administrative decision.

Proceedings to appeal a final commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box below.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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 (or petition for review or hearing) 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 distribution or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision in Alaska Workers' Compensation Appeal Commission Appeal No. 08-019, *Fairbanks Memorial Hospital and Harbor Adjustment Serv. Co.,* dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *18th* day of *March*, 200*9*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *3/18/09* a copy of this Final Decision in AWCAC Appeal No. 08-019 (Decision No. 103) was mailed to R. Witty & Z. Wilson, and faxed to: R. Witty, Z. Wilson, Director WCD, & AWCB Appeals Clerk.

Signed
B. Ward, Deputy Appeals Commission Clerk Date