Alaska Workers' Compensation Appeals Commission

Alcan Electrical and Engineering, Inc., and Seabright Insurance Co.,
Appellants, Cross-appellees,

vs.

Redi Electric, Inc., and Novapro Risk Solutions,
Appellees, Cross-appellants,

and

Michael Hope,
Appellee.

Final Decision
Decision No. 112 July 1, 2009

AWCAC Appeal No. 08-031
AWCB Decision No. 08-0212
AWCB Case No. 200511005

Appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 08-0212, given verbally in hearing on October 16, 2008, and issued in writing on November 12, 2008, by southcentral panel members William J. Soule, Chair, and Robert C. Weel, Member for Industry.

Appearances: Joseph M. Cooper, Russell, Wagg, Gabbert & Budzinski, for appellants and cross-appellees Alcan Electrical and Engineering, Inc., and Seabright Insurance Co. Chancy Croft, Croft Law Office, for appellee Michael Hope. Patricia Zobel, DeLisio Moran Geraghty & Zobel, for appellees and cross-appellants Redi Electric, Inc., and Novapro Risk Solutions.

Commission proceedings: Motion for Extraordinary Review of October 16, 2008, verbal board order filed October 23, 2008, with Movants' Motion for Stay. Opposition to motions filed October 31, 2008. Motion for stay heard November 3, 2008. Notice of Alaska Workers' Compensation Board Dec. No. 08-0212 filed November 14, 2008. Status conference held November 14, 2008. Notice of hearing and scheduling order for renewal of motion for stay and motion for extraordinary review and filing cross-motions issued November 17, 2008. Renewed Motion for Extraordinary Review and Motion for Stay filed November 21, 2008. Cross Appeal of Redi Electric (deemed Cross-Motion for Extraordinary Review) filed November 21, 2008. Opposition to motions and to cross-appeal filed November 26, 2008. Hearing on motions held December 1, 2008. Notice

of decision issued December 22, 2008. Decision and Order on Motion for Extraordinary Review, Decision No. 097, issued January 23, 2009. Briefing expedited by order and closed April 10, 2009. Oral argument waived in status conference April 24, 2009. Notice of Proposed Decision on Appeal issued May 4, 2009.

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

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

By: Kristin Knudsen, Chair.

The commission agreed to hear this appeal following a motion for extraordinary review from a decision first announced by the board in a hearing on Redi Electric's petition to join a second employer, Alcan Electrical and Engineering, Inc., to a claim filed by Michael Hope, and Alcan's request for continuance of the hearing on the merits of Hope's claim, scheduled to begin a few weeks later. The board followed its verbal decision with a written decision and order which confirmed its decision to order Alcan to pay compensation and also ordered Hope to attend, and Redi to pay for, a Second Independent Medical Evaluation (SIME) pursuant to AS 23.30.110(g).[1] Alcan renewed its motion for extraordinary review and Redi filed a cross-motion for extraordinary review. The commission granted the motion and cross-motion for extraordinary review.[2]

On appeal, Alcan argues the board erred by: ruling on issues not set for hearing, without notice and opportunity to be heard; directing payment of compensation without requiring a claim to be filed; ordering an SIME by a physician who had already formed an opinion against the appellant; and, denying appellant a fair hearing by allowing other persons to witness the board's deliberations. Redi also argues that the board erred by permitting others to be present during deliberation, ruling on questions not set

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[1] *Michael Hope v. Redi Electric, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 08-0212, 48 (Nov. 21, 2008).

[2] *Alcan Elec. & Eng'g, Inc., v. Hope*, Alaska Workers' Comp. App. Comm'n Dec. No. 097, 17 (Jan. 23, 2009).

for hearing, and by ordering it to pay for an SIME without opportunity to oppose or making the findings required by the commission's decision in *Bah v. Trident Seafoods, Inc*.[3] Redi disputes Alcan's claim of error regarding the board's choice of examiner, arguing that the choice was within the board's discretion. Hope opposes and argues that neither Alcan nor Redi was denied notice and opportunity to be heard because the board is not required to give notice before investigating a claim under AS 23.30.135; that Alcan's objection to payment of compensation is moot because it paid the compensation; and, that the commission does not have jurisdiction to hear an appeal of an "interim" decision. In reply, Redi opposes Hope's argument regarding jurisdiction, arguing that it was waived because he failed to raise the issue before filing his brief and that this argument is without merit. Redi also contends that Hope's argument (that the hearing and subsequent decision were a board investigation that does not implicate due process) was not raised in the appeal or a cross-appeal and so cannot be considered.

The parties' contentions require the commission to decide if the board erred by directing Alcan to pay temporary total disability (TTD) compensation through the date of the projected board hearing on the merits, if the board correctly interpreted the commission's decision in *State, Dep't of Corr. v. Dennis*,[4] and if the board may direct an employer to pay compensation in the absence of a claim against the employer. The parties' contentions also require the commission to decide if the board had authority to direct Hope to attend, and Redi to pay for, an examination by the board's physician under AS 23.30.110(g) without notice to the parties. Finally, the assertion that other division staff were present during the hearing panel's deliberations requires the commission to consider if the hearing panel's deliberations were confidential and if the presence of other persons violated the rights of the parties to fair consideration of their arguments.

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[3] Alaska Workers' Comp. App. Comm'n Dec. No. 073 (Feb. 27, 2008).

[4] Alaska Workers' Comp. App. Comm'n Dec. No. 036 (Mar. 27, 2007).

1. Factual background and board proceedings.

Michael Hope injured his back, hip, and left elbow in a fall from a ladder in June 2005.[5] His employer, Redi Electric, Inc., voluntarily paid an initial period of compensation.[6] Hope worked from September 2005 for Haakensen Construction.[7] From November 2005 to March 2006, Hope worked for Kachemak Electric.[8] He then worked for Alcan Electrical and Engineering, Inc., beginning in April 2006 and continuing until November 2006.[9]

Later, a dispute arose between Hope and Redi regarding Hope's medical treatment of his back, after Hope stopped working for Alcan. Redi controverted all benefits in March 2007, based on a report by its medical examiner, Dr. Schilperoot.[10] Hope filed a workers' compensation claim seeking medical benefits and disability compensation from Redi in May 2007.[11] This claim was controverted on the grounds that Hope's need for surgery and related disability compensation were not causally related to the injury in June 2005.[12] In a deposition given in 2007, Hope said that his back hurt worse after he worked for Alcan in 2006.[13] After reviewing Hope's deposition, Dr. Schilperoot opined that the employment by Alcan was not the substantial cause of Hope's need for medical treatment.[14] Meanwhile, the parties had agreed to an SIME, and the board's officer selected John McDermott, M.D., to do the examination.[15]

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5 R. 0001

6 R. 0002. Hope's physician returned him to light duty on July 5, 2005, R. 0415, and to full duty on July 11, 2005. R. 0413.

7 Hope Dep. Ex. 1.

8 *Id.*

9 *Id.*

10 R. 0006.

11 R. 0015-16.

12 R. 0008.

13 Hope Dep. 41:7-10.

14 SIME supp. 00264.

15 R. 0775.

Dr. McDermott's report, dated February 25, 2008, said that the 2005 injury aggravated Hope's pre-existing back conditions, suggested that the surgery by Dr. Yeung was ineffective, and recommended additional tests before considering further surgery.[16] On May 19, 2008, Hope had back surgery.[17]

Redi scheduled Dr. Schilperoot's deposition, but he died shortly before his deposition.[18] A September 2008 hearing was rescheduled and Redi had the opportunity to obtain another expert opinion.[19] The hearing on Hope's claim was scheduled for November 4, 2008.[20] Redi selected Dr. Bald as a successor to Dr. Schilperoot. On September 25, 2008, Dr. Bald delivered an opinion that Alcan's employment was the substantial factor in Hope's need for medical treatment.[21]

On September 24, 2008, Redi filed a petition to join Alcan as a last injurious employer, although Hope had not filed a claim against Alcan.[22] Redi also sought a continuance of the hearing now scheduled for November 4, 2008.[23] Alcan appeared at a September 30, 2008 "emergency" prehearing conference, but its attorney had not had an opportunity to review the matter, so he did not take a position before the 20 days permitted to respond to the petition to join.[24] Hope opposed the petition to join and the continuance of the hearing, unless Alcan would pay Hope benefits from November 4, 2006, until a decision was issued and advance him $10,000.[25]

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16 R. 0586.

17 R. 0739.

18 R. 0861.

19 R. 0953.

20 R. 0861.

21 R. 0747.

22 R. 0136.

23 R. 0090-91, 0831.

24 R. 0828-9; 8 Alaska Admin. Code 45.050(c)(2).

25 R. 0829.

Dr. McDermott's deposition was taken October 2, 2008. In his deposition, he ruled out Redi Electric's injury as a contributor to the need for the May 2008 surgery.[26] Instead, he opined that the Alcan employment was the substantial factor in bringing about the need for the May 2008 surgery.[27]

At a second pre-hearing conference at 12:30 p.m. on October 16, 2008,[28] Hope filed a petition for interim compensation.[29] Alcan opposed joinder and advised that, if it were joined to the claim, it would request a continuance of the November 4, 2008, hearing.[30] The workers' compensation officer informed the parties that the petition to join Alcan could be heard the same day, October 16, 2008, at 1:30 p.m.[31] The parties waived notice of hearing and appeared shortly afterwards before the board.[32]

After hearing argument, the board excused the parties' attorneys.[33] The workers' compensation officer who had conducted the pre-hearing conference, and two division hearing officers, remained in the room.[34] The board called the parties back into hearing 40 minutes later[35] and verbally ordered the parties joined.[36] The board directed Alcan, against whom no claim had been filed, to pay interim TTD compensation indefinitely,[37] over the objection by Alcan that the parties understood that the only issue

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26 McDermott Dep. 33:13-18.

27 *Id.* at 33:19-22.

28 R. 0827.

29 R. 0152, 0838.

30 R. 0957-60, 0838.

31 R. 0838.

32 *Id.*

33 Tr. 41:4-7.

34 Br. of Cross-appellants Redi Electric 12; Opening Br. of Appellants 5, n.18. Appellee Hope does not contest this assertion. Br. of Michael Hope 5. The board's decision does not mention the presence or absence of other persons in the deliberation.

35 Tr. 41:14, 19.

36 Tr. 41:17, 42:5-7.

37 Tr. 42:8-11.

to be decided was the continuance and the petition for joinder.[38] The board also directed that a Second Independent Medical Evaluation (SIME) take place under AS 23.30.110(g), although it did not then state who would pay for it.[39]

In the written decision that followed, the board said that the order to pay compensation was based on the self-executing nature of AS 23.30.155(d) and the assertion of a last injurious exposure defense, not the petition for interim compensation.[40] It found that "the sole reason for Redi's current controversion is their last injurious exposure defense."[41] It directed that compensation should be paid "until the Board-ordered medical evaluation is completed and we decide the case on its merits."[42] It also reviewed the medical evidence,[43] including a deposition that was not filed at the time of the hearing,[44] and *sua sponte* ordered another SIME.[45] The board directed that the SIME should be conducted by the same evaluator who previously opined that the work for Alcan was the substantial factor in Hope's need for back

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38 Tr. 43:12-17.

39 Tr. 42: 12-18.

40 *Michael Hope,* Bd. Dec. No. 08-0212 at 43.

41 *Id.* at 37 n.215.

42 *Id.* at 45.

43 *Id.* at 2-24, 32-37. Dr. McDermott's deposition was taken Oct. 2, 2008, before Alcan was joined as a party. *Id.* at 32.

44 *Id.* at 34-37. Dr. Bald's testimony was taken after the Oct. 16, 2008, hearing, on Oct. 17, 2008. *Id.* at 34. The board did not give notice that it was opening the record to consider additional evidence.

45 *Id.* at 47. The board based its order on AS 23.30.110(g), which provides:

> An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

surgery and disability.[46] No claim had been filed against Alcan Electrical[47] and Alcan Electrical's expert had not yet examined Hope.[48]

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 board's findings.[49] In reviewing the board's decision, the commission does not consider evidence that was not in the board record when the board's decision was made.[50] A board determination of credibility of a witness who appears before the board will not be disturbed by the commission.[51]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[52] 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.[53] 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' compensation[54] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[55]

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46 *Michael Hope,* Bd. Dec. No. 08-0212 at 47.

47 *Id.* at 40, n.216.

48 *Id.* at 47.

49 AS 23.30.128(b).

50 AS 23.30.128(a). The commission makes its decision based on the record before the board, the transcript of the hearings, the briefs filed by the parties, and oral argument.

51 AS 23.30.128(b).

52 *Id.*

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

54 AS 23.30.007(c)(1)(D), .007(c)(2)(C), .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).

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

3. Discussion.

a. The board's regulations require it to provide notice and opportunity to be heard before an issue is considered by the board.

AS 23.30.001(4) states the legislature intends that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered." AS 23.30.110(c) requires the board to "give each party at least 10 days' notice of the hearing," and, once notice of a hearing has been given, "the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board." 8 Alaska Admin. Code 45.070 provides in part:

> (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.
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> (h) If no prehearing was conducted or if not determined at the prehearing, the board will provide for opening and closing arguments, including a statement of the issues, in accordance with 8 AAC 45.116.

Thus, the intent of the Act, that parties should be afforded "due process and an opportunity to be heard and for their arguments and evidence to be fairly considered," is implemented in part by the statutory requirement that parties receive adequate notice of a hearing and the board's regulations requiring the board and parties have notice of the issues and "conduct of the hearing."

The fundamental requirement of due process in Alaska "in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[56] Notice and an opportunity for argument and evidence to

[56] *Aguchak v. Montgomery Ward Co.*, 520 P.2d 1352, 1356 (Alaska 1974) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 70 S. Ct. 652, 94 L. Ed. 865 (1950)) (adopting the *Mullane* due process standard for constitutionally effective notice under the Alaska Constitution).

be heard are essential elements of due process in Alaska administrative proceedings.[57] The Alaska Supreme Court said

> 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 cured by other evidence that the parties knew what the proceedings would entail.[58]

The Court held that the board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties."[59] The board has discretion to raise questions *sua sponte* with sufficient notice to the parties.[60] But, absent findings of "unusual and extenuating circumstances," the board is limited to deciding the issues delineated in the prehearing conference, and, when such "unusual and extenuating circumstances" require the board to address other issues, sufficient notice must be given to the parties that the board will address these issues.[61]

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[57] *Robles v. Providence Hospital*, 988 P.2d 592, 596 (Alaska 1999) (due process in administrative proceedings includes "an impartial tribunal, that no findings were made except on due notice and opportunity to be heard, that the procedure at the hearing was consistent with a fair trial, and that the procedure was conducted in such a way that there is an opportunity for a court to ascertain whether the applicable rules of law and procedure were observed."). *See also Evans v. Native Vill. of Selawik IRA Council*, 65 P.3d 58, 60 (Alaska 2003) (citing *City of N. Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997); *Walker v. Walker*, 960 P.2d 620, 622 (Alaska 1998)).

[58] *Groom v. State, Dep't of Trans.,* 169 P.3d 626, 635 (Alaska 2007) (quoting *North State Tel. Co. v. Alaska Pub. Util. Comm'n*, 522 P.2d 711, 714 (Alaska 1974) (other citations omitted).

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

[60] *Id.; Summers v. Korobkin Constr.,* 814 P.2d 1369, 1372 n.6 (Alaska 1991).

[61] 8 Alaska Admin. Code 45.070(g)-(h) provides:

b. The board disregarded its obligation to provide notice of the issues and its consideration of additional evidence.

Both appellants and cross-appellants assert that when their attorneys entered the hearing on October 16, 2008, after the prehearing conference, they believed the hearing concerned only the petition to join Alcan as a party to the claim and, if it was joined, a request for a continuance of the scheduled hearing on the merits of Hope's claim. In his brief on appeal, appellee Hope does not dispute this assertion.

In *Smith v. CSK Auto, Inc.*,[62] the Supreme Court reversed the commission's decision affirming the board's denial of a claim to set aside a settlement agreement. The Court held that the board had not followed its own regulation in approving the settlement, so the board's subsequent refusal to set it aside later was an abuse of discretion. Here, a prehearing conference had been held, so 8 Alaska Admin. Code 45.070(g) applied. Nonetheless, the board failed to follow its own regulation in taking up matters not recorded in a pre-hearing summary. While the parties agreed to short notice of the hearing, there is no evidence that they agreed to allow the board to consider any issue other than the joinder of an employer and a request for a continuance. At the beginning of the hearing, the issue before the board was summarized by the board chair: "So I think the goal today was to find out whether or not we are going to grant the petition to join so as to find out what's going to happen on November the 4th, who is going to be playing, so to speak, in that particular hearing."[63] Thus, even if there had been no prehearing conference, the board's own

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> (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.
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> (h) If no prehearing was conducted or if not determined at the prehearing, the board will provide for opening and closing arguments, including a statement of the issues, in accordance with 8 AAC 45.116.

62 204 P.3d 1001 (Alaska 2009).

63 Tr. 4:18-22.

statement of the issue for hearing limited the board's decision to "whether or not [the board is] going to grant the petition to join."

In the hearing, the parties briefly discussed specific medical reports that were referred to in the petition to join during the hearing. However, the context of the discussion was establishing when Redi had notice of a possible "last injurious employment" defense in response to Alcan's assertion that it had been unfairly surprised by a motion to join less than two months before a scheduled hearing on the merits of the claim.[64] The hearing transcript reveals no point at which the board raised to the parties the possibility of the board ordering another medical examination under AS 23.30.110(g) before the end of the hearing when the board ordered the examination.[65]

The board hearing took place on very short notice and members had less than one hour to prepare for the hearing.[66] Because the board's decision was announced at the hearing, there is no doubt that the record was closed when it retired to deliberate. Moreover, the board had not then received the deposition of Dr. Bald because Dr. Bald had not been deposed. A review of his deposition was impossible before the hearing and announcement of the board's decision.

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[64] *See* Tr. 34:24 – 35:6.

[65] Appellee Hope's counsel, responding to a question from the chair asking him to list the statutes he mentioned, stated:

> And in terms of .155(b), provides, -- addresses the question of last injurious exposure, but (h) also has been interpreted by the superior court, the last phrase, that the board may basically do whatever it wants, cause a medical examination to be made, hold hearings, and take further action which it considers will properly protect the rights of all parties.

Tr. 30:2-8. The board chair did not suggest in his response that the board would, in the hearing, "take further action" beyond deciding the petition to join.

[66] The hearing began at 1:32 p.m., Tr. 1:8-9. The prehearing conference before Workers' Compensation Officer White began at 12:30 p.m., R. 0827. Because the matter was not scheduled to come before the board that day, the board, like the parties, had less than one-hour's notice of the hearing.

Yet, the board's written decision, with its lengthy review of the medical evidence, extended beyond the bounds of the limited question presented in the hearing.[67] In undertaking a complete review of the medical evidence, the board expanded the subject matter of the hearing and reviewed evidence that it had not considered when it made its decision at hearing, without giving notice to the parties that it intended to do so. More importantly, the volume of medical evidence detailed in the written decision could have formed very little part of the decision made at the hearing. The members had no opportunity to review the medical evidence *in the detail related in the written decision* before issuing their decision at the hearing. The matter was not scheduled, so the board members did not have time to read all the medical evidence in the short time before the hearing. The board members could not have read and considered it all in the 40 minutes the board deliberated. The board's extensive review of the medical evidence, and its accompanying findings regarding the medical evidence, could only have taken place after the board issued its decision at the hearing.

The extension of the issues considered by the board beyond the petition to join was contrary to the board's own regulations. Given the extent of the board's departure from the announced issue, the board's failure to give notice to the parties that it intended to go beyond the record immediately before it in the hearing, and the lasting impact of the board's findings and order on the rights of the parties, the error is not harmless.[68]

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[67] The board noted without explanation that "[s]ubsequent to our hearing, we also reviewed Dr. Bald's October 17, 2008, deposition." Bd. Dec. 08-0212 at 34.

[68] *See Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1013 (Alaska 2009); *Schouten v. Alaska Indus. Hardware,* Alaska Workers' Comp. App. Comm'n Dec. No. 094, 10-11 (Dec. 5, 2008); *Wolford v. Hansen,* Alaska Workers' Comp. App. Comm'n Dec. No. 030, 13 (Feb. 2, 2007). *See also Garner v. State, Dep't of Health and Soc. Servs.,* 63 P.3d 264, 269 (Alaska 2003) (holding that the reviewing court may find an agency's failure to apply its own regulations, or at least inquire into their applicability, is legal error).

c. The board erred by deciding issues not raised by the parties based on evidence not before the board when the record closed.

The written decision that followed the short hearing on a petition to join a later employer contains a detailed review of the medical evidence, including evidence that did not exist at the time the record on the petition closed. Nothing in the transcript or record indicates the board gave the parties notice that it was going to consider extra-record evidence or decide issues that were not presented.

In its decision, the board directed Alcan to pay Hope temporary total disability compensation.[69] The board stated that "our remedy on this point [is] particularly compelling under the Act given that in this case, Employee at present has no desire to seek relief from Alcan."[70] After quoting from the commission's decision in *State, Dep't of Corr. v. Dennis*, without further discussion of facts in Hope's case, the board said, "Based upon this case's unique facts, as set forth in detail above, we will award interim compensation until the Board-ordered medical evaluation is completed and we decide the case on its merits."[71]

Thus, the extensive review of the facts undertaken by the board in its written decision was done to justify its decision to "award interim compensation until . . . we decide the case on its merits"[72] by establishing that the circumstances were sufficiently "unique" to depart from the statute that terminates entitlement to temporary disability compensation on reaching medical stability[73] and to extend the employee's entitlement

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69 Bd. Dec. No. 08-0212 at 48.

70 *Id.* at 43.

71 *Id.* at 44-45.

72 *Id.* at 45.

73 AS 23.30.185 provides in part, "Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability." AS 23.30.200 provides that "Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability."

to TTD compensation to the board's decision on the merits.[74] As part of this process, the board also decided if the only colorable defense to Hope's claim asserted by Alcan and Redi was that the other employer was liable and that Hope would not reach medical stability until the board's decision on the merits was reached. Whether the board had authority to make such an award under AS 23.30.155(d) was never addressed by the parties because the board gave them no opportunity to do so.

Given the brevity of the hearing, the narrowness of the issue presented on short notice, the citation of a deposition not before the board at the time of the hearing, and the length of the written decision, it is clear that the board hearing panel expanded its decision beyond the issues decided at the hearing without notice to the parties. The board hearing panel used the occasion of writing a decision following a short hearing on a petition to join a party, and a request for a continuance, to examine issues it believed would be heard later, give direction to the parties, and push the case forward toward hearing the merits.[75] Notwithstanding the understandable desire to move a case quickly forward, board hearing panels should resist the temptation to do, in the phrase of former Board Member for Labor John Creed, "unnecessary good." Here the board anticipated the parties' positions and, in order to shorten delay, made findings and conclusions on issues that may be raised and disputed later. The board may not decide issues not raised by the parties without giving notice to the parties and an opportunity to be heard.

In this case, the board decided that Redi was liable for compensation unless Alcan was liable for Hope's claim for surgery when it found that Redi "controverted

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[74] "Interim compensation" is not a separate class of compensation. AS 23.30.155(d), cited by the board as the basis for its award, provides for payment of "temporary disability benefits . . . during the pendency of the dispute." Thus, the board's award was for receipt of temporary disability benefits, either partial or total. The legal issue whether such awards may extend beyond the date of medical stability was not addressed by the board, except to say that the "unique facts" of the case justified the award.

[75] The commission finds nothing in the record to suggest the board sought to direct the final outcome of the case.

[Hope's] claim . . . solely on the basis that Employer Alcan may be responsible."[76] This is an unspoken decision on the merits of Hope's claim against Redi Electric.[77] There was no notice to the parties that the board intended to take up the merits of Hope's claim and Redi Electric's defenses to it.

By framing its order for payment of temporary total disability compensation through the date of the board's decision on the merits of his claim, instead of on terms framed to Hope's temporary disability, the board found that Hope will not reach medical stability until a hearing is held. Apart from the lack of evidence to support such a prediction of temporary total disability, the board did not give the parties notice that it would decide the issue of medical stability or entitlement to compensation through the date of the hearing.[78]

d. AS 23.30.135(a) does not give a board hearing panel unlimited power to order examinations when deciding claims.

The appellee argues the board's decision to require an SIME is an exercise of its investigatory function under AS 23.30.135.[79] He argues that the board's investigatory

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[76] Bd. Dec. No. 08-0212 at 37.

[77] AS 23.30.155(d) applies only when payment of temporary disability benefits "is controverted solely on the grounds that another employer . . . may be responsible for all or a portion of the benefits." *Id.* Thus, Redi Electric must either concede that *if* Alcan Electrical is found not to be liable, it is liable, or, the board decides as a matter of law that the only colorable defense asserted by Redi Electric is that Alcan Electrical is liable. Here Redi Electric did not concede that it would be liable in the event that Alcan Electrical was found not liable. Redi Electic filed no amendment to its answer withdrawing its denial of liability for permanent partial impairment compensation and additional medical benefits. Therefore, the underlying question decided by the board was whether Redi Electric's defense that it was not liable for the surgery was "colorable" – a defense permissible in law given undisputed facts and facts supported by substantial evidence, e.g., a defense based on sufficient evidence to rebut the presumption.

[78] Alternatively, by directing payment through the board's decision, the board revealed an intent to impose a price on delay and the exercise of appellants' rights to prepare for a hearing. No statute permits the board to order an employer to pay compensation as a condition of obtaining a hearing on a disputed claim.

[79] Br. of Michael Hope 8.

power is unlimited, so the board may engage in investigation without notice to the parties, and that the parties are not entitled to procedural due process when the board investigates.[80] The appellants argue that they were denied notice of the issues and evidence the board relied on, and an opportunity to be heard on the necessity of an SIME as well as the chosen examiner.[81] Cross-appellant Redi also argues the board failed to make findings required by the commission's decision in *Bah v. Trident Seafoods Corp.*[82] Redi argues in reply that Hope may not "reframe" the issues on appeal so as to argue a point not raised by the appellants.[83] The commission addresses Hope's argument as if Hope responds to appellants' claim of denial of due process by

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[80] *Id.* at 10-13.

[81] Opening Br. of Appellants and Cross-Appellees Alcan Elec. & Eng'g, Inc., and Seabright Ins. Co. 13-14.

[82] Alaska Workers' Comp. App. Comm'n Dec. No. 073 (Feb. 27, 2008), Cross-appellants' Br. 25-28. In *Bah,* the commission held the board may order an examination under AS 23.30.110(g) when there "is a significant gap in the medical or scientific evidence and an opinion by an independent medical examiner or other scientific examination will help the board in resolving the issue before it." App. Comm'n Dec. No. 073 at 5.

[83] Reply Br. of Cross-appellants 3-4. Redi Electric cites *Anderson v. Edwards*, 625 P.2d 282, 285 (Alaska 1981) (refusing to consider appellee's argument since it was not properly raised) and *Swick v. Seward School Bd.*, 379 P.2d 97, 102 (Alaska 1962). In *Anderson,* the court said

> *Alaska Brick Co. v. McCoy*, 400 P.2d 454, 457 (Alaska 1965), compels this conclusion. In *McCoy*, appellee in its brief sought a modification of the judgment increasing the attorney's fee award. Appellee neither filed a cross-appeal nor a cross-statement of points in appellant's appeal. We held: "Orderly procedure will not permit an appellee to attack a judgment for the first time in his brief in the appellant's appeal." *Id.*

625 P.2d at 285. However, the Court also cited then Appellate Rule 9(e), which provided that the "court will consider nothing but the points so stated (in the statement of points on appeal)." *Id.* at 285 n.5. The commission's regulations provide that the appellee's brief must "contain an argument section with the contentions of the appellee *with respect to the issues presented."* 8 Alaska Admin. Code 57.150(d) (emphasis added).

saying, in effect, that no process is due when the board orders an SIME because the board is acting as an investigatory body.

It is well established in Alaska law that investigatory and adjudicatory functions may reside in the same administrative agency.[84] The Supreme Court has held that "[t]his dual function, in and of itself, [does] not result in a biased or partial tribunal."[85] However, the question here is not whether the workers' compensation board *has* investigatory powers, the question is whether those powers may be exercised by a hearing panel in the course of adjudicating a claim, at the parties' expense, without giving notice to the parties the hearing panel intends to investigate questions not raised by the parties to the adjudicatory proceeding.

The Alaska Workers' Compensation Act assigns to the division or department the specific authority to investigate failures to insure for workers' compensation liability[86] or employer, insurer, and employee fraud.[87] The Act assigns the power of investigation of workers' compensation insurers and their policies to the director of the division of insurance.[88] The reemployment benefits administrator is granted the power to "review" the performance of rehabilitation specialists for eligibility to receive referrals under the Act.[89] The Act permits the board to declare a default "[a]fter investigation, notice and hearing, as provided in AS 23.30.110," but does not specifically assign the task of

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[84] *In re Cornelius,* 520 P.2d 76, 84 (Alaska 1974) ("The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed.", *abrogated in other part by Poulin v. Zartman,* 542 P.2d 251, 261 (Alaska 1975)) (citations omitted).

[85] *In re Hanson,* 532 P.2d 303, 306 (Alaska 1975) (noting that the commission member who conducted the investigation was required to take no part in a determination of a matter he investigated).

[86] AS 23.30.075, .080, .085.

[87] AS 23.30.280.

[88] AS 23.30.025.

[89] AS 23.30.041(b)(4). 8 Alaska Admin. Code 45.440 establishes the procedure for the administrator to disqualify a specialist. The specialist has a right of review by the board of the administrator's decision. 8 Alaska Admin. Code 45.440(i)-(j).

investigation to the board.[90] The Act also provides for a committee to meet and make reports and recommendations to the board or the department.[91] This committee has no power to adjudicate rights between parties. Only a hearing panel may hear a claim and decide the rights of the parties to a claim.[92]

AS 23.30.005(h) provides that "the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute." In other words, the board's authority to examine books and records or compel attendance of witnesses is limited to the "questions in dispute" in a particular proceeding. The section of the Act that establishes the board does not grant the board wide-ranging power to investigate

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[90] AS 23.30.170(a) provides

> In case of default by the employer in the payment of compensation due under an award of compensation for a period of 30 days after the compensation is due, the person to whom the compensation is payable may, within one year after the default, apply to the board making the compensation order for a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in AS 23.30.110, the board shall make a supplementary order declaring the amount of the default. The order shall be filed in the same manner as the compensation order.

[91] AS 23.30.095(j) provides for the appointment of a medical services review committee to "assist and advise the department and the board in matters involving the appropriateness, necessity, and cost of medical and related services provided under this chapter." In addition to this committee, 8 Alaska Admin. Code 45.092(b) establishes a committee to select physicians for the board's independent medical examiner list.

[92] AS 23.30.005(f): "Two members of a panel constitute a quorum for hearing claims . . . ." AS 23.30.005(g): "A claim may be heard by only one panel." The department may by regulation provide that "procedural, discovery or stipulated matters" may be heard by the commissioner or a hearing officer rather than a panel. AS 23.30.005(h). At the time of this decision, no such regulations had been adopted or approved.

the workers' compensation system comparable to, for example, the Regulatory Commission of Alaska.[93]

AS 23.30.135 provides

> Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.

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[93] AS 42.05.141 provides in part

> General powers and duties of the commission. (a) The Regulatory Commission of Alaska may do all things necessary or proper to carry out the purposes and exercise the powers expressly granted or reasonably implied in this chapter, including
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> (1) regulate every public utility . . . inside the state, except to the extent exempted by AS 42.05.711;
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> (2) investigate, upon complaint or upon its own motion, the rates, classifications, rules, regulations, practices, services, and facilities of a public utility and hold hearings on them;
>
> (3) make or require just, fair, and reasonable rates, . . . for a public utility;
>
> (4) prescribe . . . safety of operations of a public utility;
>
> (5) require a public utility to file reports and other information and data;
>
> (6) appear . . . and represent the interests and welfare of the state in all matters and proceedings involving a public utility . . . and to intervene in, protest, resist, or advocate the granting, denial, or modification of any petition, application, complaint, or other proceeding;
>
> (7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

> (b) All testimony given during a hearing before the board shall be recorded, but need not be transcribed unless further review is initiated. Hearings before the board shall be open to the public.

In this section, the legislature identified three activities of the board that are not subject to formal rules of procedure or the rules of evidence, except as provided by the Act. Twice in the same section, the legislature said the board may "make its investigation or inquiry *or* conduct its hearing" (emphasis added). The use of the disjunctive "or" instead of the conjunctive "and" in section .135(a) separates the function of making an investigation or inquiry from the function of conducting a hearing.

This separation of function is consistent with the rule that due process requires some separation between those persons prosecuting (or investigating) the claim and those adjudicating it.[94] This does not mean that the board is barred from exercising its power to require an examination under AS 23.30.110(g)[95] in adjudicating a dispute. It

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[94] *Disciplinary Matter Involving Walton,* 676 P.2d 1078, 1082 (Alaska 1984). In *Walton,* the Supreme Court found that procedures that required a board to appoint an administrator who, in his discretion, prosecuted complaints that were heard by "Hearing Committees," and that permitted the board to hear appeals from hearing committee decisions, did not violate due process. *See also In re Robson*, 575 P.2d 771, 774 (Alaska 1978) (holding bar counsel's presence in disciplinary committee deliberations violated due process, notwithstanding that bar counsel did not conduct the prosecution of the disciplinary charge).

[95] AS 23.30.110(g) provides

> An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board may require. The place or places shall be reasonably convenient for the employee. The physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation may be payable for a period during which the employee refuses to submit to examination.

Unlike AS 23.30.095(k), section .110(g) does not explicitly impose the cost of an examination on employers or provide for compensation to the employee for his costs of attendance. Instead, 8 Alaska Admin. Code 45.090(b) provides that "Except as provided in (g) of this section, regardless of the date of the employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section." Similarly, 8 Alaska Admin. Code

does mean that when the board is conducting a hearing, (adjudicating a dispute), the board may not simultaneously make an investigation.

The function of adjudication is not the same function as investigation. When the board adjudicates, it reaches a judicial decision on a dispute between parties, it decides the legal rights and obligations of parties to a particular dispute, and it issues orders fixing the parties' legal obligations to each other. When the board makes an investigation, it carries out an official inquiry or examination to find information about a specific person or claim.[96] It does not decide the legal rights of the parties. The cases cited by the appellee distinguish the investigatory function from the adjudicatory function, when due process compels notice and opportunity to be heard, on this basis. For example, in *Hannah v. Larche*,[97] the U.S. Supreme Court upheld the constitutionality of a Civil Rights Commission. The appellants, subpoenaed to appear before the Commission, challenged their inability to confront and examine the complaining witnesses. Rejecting their challenge, the Court said the Commission's function was

> purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, *the*

45.090(d) requires the employer to pay the employee's costs of transportation and room and board if necessary to be away from home overnight.

[96] Traditionally, the government's investigatory function is carried out by bodies such as the grand jury, legislative committees, or enforcement arms of the executive branch. As the Alaska Court of Appeals noted, "[T]he abuse [addressed by the constitution's confrontation clause] was not the inquest itself. (Indeed, the grand jury inquest and the coroner's inquest are still fixtures of American law.) Rather, the abuse was that these inquisitorial proceedings were employed to obtain accusatory statements that were later introduced, as hearsay, at criminal trials. That is, these accusatory statements were used against criminal defendants, even though the makers of these statements were never brought to court so that the defendants might cross-examine them. *Anderson v. State*, 111 P.3d 350, 357 (Alaska App. 2005) (citing *Crawford v. Washington*, 541 U.S. 36, 42-55 (2004)).

[97] 363 U.S. 420 (1960).

> *Commission does not and cannot take any affirmative action which will affect an individual's legal rights.* The *only* purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.[98]

In *Jenkins v. McKeithen,* the U.S. Supreme Court determined that the Louisiana Labor-Management Commission of Inquiry was required to afford due process because it was not purely investigative and made actual findings that a specific individual is guilty of a crime.[99] The Court said the Commission "exercises a function very much akin to making an official adjudication of criminal culpability."[100]

> [N]othing in the Act indicates that the Commission's findings are to be used for legislative purposes. Rather, everything in the Act points to the fact that it is concerned only with exposing violations of criminal laws by specific individuals. In short, the Commission very clearly exercises an accusatory function; it is empowered to be used and allegedly is used to find named individuals guilty of violating the criminal laws of Louisiana and the United States and to brand them as criminals in public.[101]

And, in *WMX v. Miller,*[102] the Ninth Circuit Court of Appeals rejected a claim that a waste management company was deprived of a property interest without due process because, in an investigation report prepared by the county district attorney at the request of the county Board of Supervisors following a request for a permit to develop a landfill, the report contained a list of concerns brought to the investigator's attention that included "[a]llegations of organized crime connections."[103] The Court held that the reputation of WMX was not a protected property interest[104] and that the district

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98 363 U.S. at 441 (emphasis added).

99 395 U.S. 411, 428-429 (1969).

100 *Id*. at 427.

101 *Id*. at 427-428.

102 197 F.3d 367 (9th Cir. 1999).

103 *Id.* at 369.

104 *Id*. at 376.

attorney "exercised an investigatory function, not an accusatory function, for the County."[105] The Court held that the Board requested the investigation

> to further its legislative determination regarding [the] then-pending application for a major use permit. . . . [The] investigation was for the purpose of assisting the Board so that further legislative action could be taken and the Board could approve or deny [the] application. The purpose, like that in *Hannah v. Larche*, was 'to find facts which may subsequently be used as a basis for legislative or executive action.' *See Hannah v. Larche*, 363 U.S. at 441, 80 S.Ct. 1502.[106]

In this case, the purpose of the ordered examination was to decide the legal rights of the parties to a claim, it was not to gather information for legislative purposes (as developing regulations) or executive action (granting a self-insurance certificate). While AS 23.30.110(g) gives the board the authority to require an examination of the employee who is claiming or entitled to receive compensation, the board's authority to require the examination of the employee's body is limited to the issues in dispute when the board is conducting a hearing, i.e., adjudicating a dispute, because the purpose of the examination must be to enable the board to decide the legal rights of the parties – not merely to find information.

In this sense, the board process differs significantly from the inquisitorial model adopted in the system of adjudicating claims for federal social security benefits. In such cases, the hearing examiner is responsible to investigate and present evidence and then to make a decision.[107] But, the U.S. Supreme Court explicitly recognized that this model is not the traditional adversarial model of adjudication, saying "Social security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against benefits."[108] In such proceedings, the claimant seeks a benefit from the government, not enforcement of a right against his employer. There is no traditional adversary.

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105 *Id.* at 377.

106 *Id.* at 377-378.

107 *Richardson v. Perales,* 402 U.S. 389, 410 (1971).

108 *Sims v. Apfel*, 530 U.S. 103, (200).

The limitation on the board's authority to order examination in conducting a hearing is imposed by the nature of adjudication between different parties by an impartial tribunal. When the board is conducting a hearing, it has the right to require examinations in order to fulfill the adjudicative function – that is, to decide the issues properly before it in the hearing. Like the authority to order examination of books in AS 23.30.005(h), the board hearing panel's power to order an examination of persons is limited to the questions in dispute before it.

In this case, the only issue before the board at the time the board ordered the employee to attend an examination was whether to join Alcan to Hope's claim against Redi. As the commission held in *Bah v. Trident Seafoods Corp.,*

> Ordering an SIME is not proper if it serves no purpose to the board by advancing its understanding of the medical evidence or by filling in gaps in the medical evidence, where that gap in the evidence, or lack of understanding of the medical evidence, prevents the board from ascertaining the rights of the *parties in the dispute before the board*.[109]

When the board ordered an SIME of Michael Hope at the end of the hearing, it failed to explain why it needed to do so. The chair said: "Number three, we will order the board's prehearing designee, . . . to schedule a medical evaluation following the procedure set forth in § .095(k), but the evaluation is ordered pursuant to 23.30.110(g), and the evaluation will be scheduled as soon as possible. . . ."[110]

In its written decision, the board justified its action on the grounds that Alcan intended to obtain an employer medical evaluation (EME) and that afterwards, there might be a medical dispute between Alcan's EME and Hope's physicians or Redi Electric's physicians.[111] On this basis alone, the board found that an SIME "after Alcan

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[109] App. Comm'n Dec. No. 073 at 5 (emphasis added).

[110] Tr. 42:12-16.

[111] Bd. Dec. No. 08-0212 at 46-47. The board also said this case presented "rather unique facts." *Id.* at 38. All cases have some distinctive facts. But, it is not exceptional or singular for an employer to assert a last injurious exposure defense to an injured worker's claim for compensation or benefits made after the injured worker left the employment for another.

has an opportunity to obtain an EME, will permit the parties and the Board to develop and ask questions regarding any remaining medical issues, will assist us greatly in deciding this complicated case on its merits and will best protect the rights of all parties."[112] Thus, the board ordered the examination to assist it in *deciding* the case, as part of its adjudicative function. The board was not "making an investigation" – it was preparing to decide the rights of the parties.

Nothing in the record demonstrates that the board was unable to decide the dispute before it on October 17, 2008. Instead, the board ordered an SIME under AS 23.30.110(g) so it would have an opportunity to ask questions regarding any remaining medical issues – before knowing what the "remaining medical issues" were, what questions to ask, what gaps in medical evidence existed, or *how* having an opportunity to question the SIME physician would greatly assist the board members.

The parties have the right to request an SIME under AS 23.30.095(k). The board may order an SIME under AS 23.30.095(k) if a medical dispute *exists.* By basing its order on the *potential* future existence of a medical dispute between the parties' experts, and a desire to have an opportunity to ask questions on unidentified prospective "remaining" medical issues, the board applied a lesser standard to AS 23.30.110(g) than required for the party-initiated process under AS 23.30.095(k). The board's power to order an examination under AS 23.30.110(g) is not a substitute for the process in AS 23.30.095(k); it should only be exercised if the party-initiated process is unavailable and the board is unable to adjudicate the dispute before it without an SIME.

The board's conclusory statement that an SIME under AS 23.30.110(g) will assist the board members is not sufficient to justify compelling the employee to undergo a medical examination under threat of losing compensation or require an employer to pay for one. A conclusory statement that ordering an SIME before a qualifying medical dispute exists will "best protect the rights of the parties" does not justify depriving the parties of their right to notice and opportunity to be heard when deciding that an SIME

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[112] *Id.* at 47.

is necessary. The commission is not persuaded to disregard the holdings of the Alaska Supreme Court in *Simon*[113] and *Groom*[114] requiring the board to notify the parties before addressing issues that the parties have not raised in the proceeding. The protection afforded by notice, opportunity to be heard, and fair consideration of evidence extends to all parties and protects employees as much as employers.

Where it is clear that the board could not yet have ordered an examination under AS 23.30.095(k), but that process is available to the parties, and the board identified no specific gaps in the medical evidence or lack of understanding of the medical evidence that prevented it from adjudicating the dispute before it, the board exceeded its authority to order an examination under AS 23.30.110(g).

e. The board erred by directing payment of compensation under AS 23.30.155(d) when no claim had been filed against the last employer.

Compensation is payable in respect to injury or death or death of an employee.[115] AS 23.30.105(a) bars the right to compensation unless a claim for it is filed.[116] The board's regulations clearly require a claim to be filed for every injury for which benefits are claimed:

> 8 AAC 45.050. Pleadings. (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) Claims and petitions.
>
> (1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.
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113 633 P.2d at 256.

114 169 P.3d at 634.

115 AS 23.30.010(a).

116 AS 23.30.105(a), "The right to compensation for disability under this chapter is barred unless a claim for it is filed . . . ."

> (5) A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case. If a single incident injures two or more employees, regardless of whether the employers are the same, two or more cases may be consolidated for the purpose of taking evidence. A party may ask for consolidation by filing a petition for consolidation and asking in writing for a prehearing, or a designee may raise the issue at a prehearing. To consolidate cases, at the prehearing the designee must
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> > (A) determine the injuries or issues in the cases are similar or closely related;
> >
> > (B) determine that hearing both cases together would provide a speedier remedy; and
> >
> > (C) state on the prehearing summary that the cases are consolidated, and state which case number is the master case number.

The operation of the presumption is linked to the filed claim,[117] as the board recognized.[118] The board has jurisdiction to hear claims,[119] issue decisions and make awards on claims.[120]

8 AAC 45.040(a) permits an employer to file a claim against another employer, and provides that an employee must be joined in the claim:

> Except for a deceased employee's dependent or a rehabilitation specialist appointed by the administrator or chosen by an employee in accordance with AS 23.30.041, a person other than the employee filing a claim shall join the injured employee as a party.

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[117] AS 23.30.120 provides in part:

> Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;

[118] The board noted that it did not apply the presumption against Alcan Electrical because no claim had been filed. Bd. Dec. No. 08-0212 at 40 n.210.

[119] AS 23.30.005(f)-(g).

[120] AS 23.30.110(c), (e).

The regulation would not require joinder of an employee as a party if only the employee or his representative or beneficiary could file a claim. But, in this case, no claim was filed against Alcan by either Redi or Hope, and Hope was not joined as a party to a claim alleging an injury during the period of employment by the later employer, Alcan Electrical.

During this claim process, the earlier employer has an opportunity to file a claim against a later employer, the later employer then has notice of the claim, and the employee is given a chance, in the party joinder proceeding, to articulate his or her objections to the claim being made. The board did not follow this regulation, leading to the result that it ordered an employer to pay compensation based on a *potential* claim.

AS 23.30.155(d) states that

> When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute.

The board ordered payment of compensation by Alcan based on Alcan's status as "the most recent employer . . . who is a party to the claim." However, the board did not join Alcan to the *same claim* filed against Redi. Hope's claim, the only one before the board, is based on an injury on June 28, 2005. There is no evidence that, for example, Alcan was Hope's true employer on June 28, 2005, instead of Redi. The board found that Redi had produced evidence that Hope suffered a later injury while working for Alcan and that this later injury resulted in the need for surgery. In short, the board found that there was a *potential* claim against Alcan, based on a different theory and date of injury, and on the basis of this potential claim against Alcan, the board joined it as a party to the existing claim, and ordered it to make "payments during the pendency of the dispute."

In order to join claims, the claims must be in existence. Neither the board's regulations nor the act permit the board to exercise its jurisdiction to direct payment of compensation against an employer based only on the belief that the employer may be

liable on a potential claim. Thus, where two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is *claim* joinder (or consolidation), not simply joinder of *parties* in a single claim.

The board's regulation on joinder recognizes the importance of the existence of a claim against the person who is sought to be joined. 8 Alaska Admin. Code 45.040(j)(4) asks the board to consider if a claim was filed by the employee against the person. 8 Alaska Admin. Code 45.040(j)(5) provides that if a claim was not filed, the board should consider "whether a defense to a claim, if filed by the employee, would bar the claim." The board may consider, for example, whether a claim filed at the time of the joinder would be barred by the statute of limitations in AS 23.30.105.

Joinder of parties is appropriate when multiple claims arise out of a single transaction – either a single injury with multiple potentially liable employers or insurers, or, in the case of claims based on a long period of aggravation or repetitious activity, such as prolonged exposure to a harmful substance, or a single employment period with successive insurers – to avoid making decisions that will have an adverse factual effect on the interests of persons not before the board, the danger of inconsistent decisions and a multiplicity of claims, and making a final award that will not end the litigation.[121] Cases based on a lifetime of prolonged exposure in an industry may

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[121] *State, Dep't of Highways v. Crosby,* 410 P.2d 724, 725-26 (Alaska 1966); *see also B.B.P. Corp. v. Carroll*, 760 P.2d 519, 525-26 (Alaska 1988); *but compare Silvers v. Silvers*, 999 P.2d 786, 792 (Alaska 2000) (holding estate of joint owner of property was not indispensable party because plaintiff's half-share of property was distinct from decedent's half-share, the relief she sought was not interwoven with the relief the joint owner's heirs might seek, and the defendant would not suffer double liability but might face liability for each half-share in separate suits). As the Supreme Court noted in *Groom,* "The board's regulation concerning joinder provides little guidance about joinder of claims." 169 P.3d at 637 n.23. In *Barrington v. Alaska Communications Group, Inc.*, 128 P.3d 1122 (Alaska 2008), the Supreme Court noted two of the factors for joinder of *parties* in the board's regulation are substantially similar to the compulsory joinder rule of Alaska Rule of Civil Procedure 19, *id.* at 1129, and it analyzed whether Barrington should have been joined as a party before the board in a manner similar to joinder analysis under the Civil Rule. *Id.* at 1129-30. The additional factors in the board's joinder regulation, 8 Alaska Admin. Code 45.040(j)(4)-(5), were

require both party joinder and claim consolidation. But, where there are distinct employers and distinct theories and dates of injury, as in this case, the appropriate process is to determine if the claims, as well as the parties, should be joined.[122] This requires that a claim be filed against the potentially responsible employer.

Had the board followed its regulations, Alcan would have been given notice of the claim it must defend; Hope would be allowed to articulate, and have the board consider, the reasons a claim should not be filed against Alcan and he should not be joined to it, and, upon the filing of a petition for joinder, the board could then join the claims and parties in a single proceeding. However, given that compensation for disability is barred unless a claim is filed, the board exceeded its authority by ordering

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not relevant to the analysis in *Barrington*, but the Court noted that "[t]he board has interpreted 8 AAC 45.040 as permitting it to join persons on its own." *Id*. at 1132. Because the board had taken this position, it could not argue on appeal that it lacked authority to require Barrington's joinder before the settlement was approved. In *Sherrod v. Municipality of Anchorage,* 803 P.2d 874 (Alaska 1990), the Supreme Court held that the Municipality's insurer should have been joined under 8 AAC 45.040(c), absent an explicit waiver of its reimbursement claim, because it may have a right to relief as an equitable subrogee of the health care providers it paid. However, *Barrington* and *Sherrod* did not were not cases of compulsory joinder of an employer whose possible liability is based on a different injury than the extant claim against another employer. 8 Alaska Admin. Code 45.040(j)(2) states that the board must consider "whether the person's presence is necessary for complete relief and due process *among the parties*." Of the same language in Civil Rule 19, the Supreme Court said in *Martech Constr. Co. v. Ogden Envtl. Servs., Inc.*, 852 P.2d 1146, 1154 (Alaska 1993), that "[I]t must be noted that complete relief refers to relief as between the parties already parties, and not as between a party and the absent person whose joinder is sought." *Id*. at 1153 (quotation omitted). If the rule in *Martech* is applied, the inquiry is whether Hope and Redi can be afforded complete relief in the dispute *between them*. 8 Alaska Admin. Code 45.040(j)(3) refers to a "party," not the absent employer, as the one the board should be concerned about imposing inconsistent obligations upon. In this case, Alcan faces the possibility of defending a claim by Hope or Redi, and Redi the possibility that it is found liable for benefits Alcan may owe. The requirement that an employer seeking joinder of another potentially liable employer on a "last injurious employment" theory file a claim if the employee has not done so frames the dispute for the board, giving structure to a situation that is not otherwise well-defined in the board's regulations.

[122] *See* 8 Alaska Admin. Code 45.040(i)-(j); 45.050(b)(5).

an employer to pay compensation under AS 23.30.155(d) when no claim had been filed against the employer.

The commission's decision in *State, Dep't of Corrections v. Dennis* is not to the contrary. *Dennis* was decided on a motion for extraordinary review.[123] In that case, the employee had filed claims against both employers.[124] The movant argued that adoption of the 2005 amendments had made application of AS 23.30.155(d) against an employer for an injury after November 7, 2005, impossible. The commission declined to accept review because the board's possible error in analysis would not evade review. The commission said,

> Just as adoption of one standard of legal cause did not require adoption of the last injurious exposure rule, the prospectively applied change in the definition of legal cause did not require the legislature to abandon use of [the last injurious exposure rule] where more than one employment in a series can be found to be a legal cause of the disability. There are now two definitions of legal cause in workers' compensation cases: one that applies to injuries prior to November 7, 2005 and one that applies from November 7, 2005 forward. There is still the possibility that more than one employment can be liable. If, as between the two, the post-November 7, 2005 employment is liable, then the last employer is liable, as it must be "the substantial cause" in relation to the earlier, pre-amendment employment, which is only "a substantial factor." The last employment that is a legal cause of the disability is still liable, without apportionment, for the disability. The board's possible error in this regard is not one that will evade review.[125]

This was the holding in *Dennis.* However, the commission also discussed applicability of AS 23.30.155(d). On this subject, the commission said

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[123] *Dennis*, App. Comm'n Dec. No. 036 at 1.

[124] *Id.* at 9 ("If, after the Department controverted liability, Dennis had not filed a claim against an earlier employer who objects to liability on the grounds that a more recent employer (the Department) is liable, the Department would have been allowed to stand on its controversion of all benefits, cease payment, and not pay until after the board heard and decided Dennis's claim.").

[125] *Id.* at 12-13.

> AS 23.30.155(d) is the board's only authority to order an employer, who files a controversion, to pay temporary compensation without a hearing and decision on whether the employer is liable to the employee. It is limited to "when payment of temporary disability benefits is controverted solely on the grounds that another employer . . . is responsible for all or a portion of the benefits." The most recent employer is not over-reaching to question whether reimbursement will be available if it should be found not liable or to ask the board to determine whether the only colorable defense by the earlier employer is that it, the most recent employer, is the legal cause of the disability.
>
> In order for there to be a colorable defense that the later employer is the legal cause of the disability, there must be some evidence in the record that would be sufficient to attach the presumption of compensability against the later employment; i.e., that there is sufficient evidence to make, with the aid of the presumption, a prima facie case that the later employer is the legal cause of the disability. If the earlier employer involved asserts other colorable defenses, AS 23.30.155(d) does not apply because the earlier employer's defense is not solely that the last injurious exposure is the legal cause of the disability, and the later employer is no longer assured of reimbursement if it prevails. If the most recent employer has other colorable defenses, AS 23.30.155(d) does not apply against it, because the most recent employer does not dispute liability "solely on the grounds" that another employer is liable.[126]

In this case, by joining Alcan to Hope's claim against Redi without requiring Redi to file a claim against Alcan, the board deprived Alcan of the opportunity to dispute liability on other grounds than that Redi was liable. The commission's decision in *Dennis* does not support extending the reach of AS 23.30.155(d) to employers against whom no claim has been filed, because an employer against whom no claim is filed cannot dispute liability for the claim – either on a variety of grounds or solely on the grounds that another employer is liable. To the extent that the board relied on *Dennis* to do so in this case, it misinterpreted the commission's decision.

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[126] *Id.* at 16-17.

f. Participation of persons who are not members of the board hearing panel, even as a silent audience, while the parties are excluded, violates the confidentiality of panel deliberations.

The appellant and cross-appellant assert that when the board directed the parties to leave the hearing room, three people remained in the room; two hearing officers and the officer who conducted the pre-hearing conference. The appellee Hope does not dispute this assertion. The board's decision does not mention this event, and no note of it, or objection to it, was recorded in the transcript. Because the appellee does not contest the assertions that the hearing panel was not alone during deliberations, the commission accepts the facts as stated in the briefs for purposes of this appeal.[127]

Generally, the commission will not consider a claim of procedural error on appeal that has not been called to the attention of the board hearing panel, unless there is plain error that affects a substantial right and is prejudicial to the result.[128] This is such a case.

A board hearing panel is an adjudicative body that engages in formal adjudication. It deliberates and decides the rights of the parties who have come before

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[127] The commission, when it reviews the board's decision on the facts, will not take new evidence, and it limits its review of the board's findings of fact to whether there is substantial evidence in light of the whole record to support the board's findings. *See* AS 23.30.128(b). Here, the commission accepts an undisputed procedural fact related in the parties' briefs for the purposes of deciding the appeal and employs its independent judgment to applying the law. *See Brotherton v. Brotherton*, 142 P.3d 1187, 1188 (Alaska 2006). The commission does not decide that the fact is true; because it is uncontested, the commission has nothing to decide. On the other hand, the commission will not accept "one party's assertions [on appeal] as to the present state of the law simply because the opposing party fails to adequately respond to those assertions." *Pomeroy v. Rizzo ex rel. C.R.*, 182 P.3d 1125, 1130 (Alaska 2008).

[128] *See Hout v. NANA Commercial Catering*, 638 P.2d 186, 189 (Alaska 1981) ("We recognize that a party is entitled to review of an instruction if the giving of the challenged instruction was plain error likely to result in a miscarriage of justice, even though proper objection was not made below.") (citing *Haskins v. Shelden*, 558 P.2d 487, 492 (Alaska 1976); *Holiday Inns of Am., Inc. v. Peck*, 520 P.2d 87, 91-92 (Alaska 1974); *Reiten v. Hendricks*, 370 P.2d 166, 169 (Alaska 1962)).

it for a decision. The process of deliberation requires the frank exchange of views among equals and candor in the review of evidence. The board's hearing panels are not made up of judges, in the constitutional sense, but they perform an essentially judicial function. The fact that the board's hearing panels are administrative bodies, which developed differently from the courts, and have less formal rules than courts, does not diminish their position as "collaborative instrumentalities of justice," and therefore, the independence of each member and the panel as a whole must be respected.[129] In a decision rejecting appellant's demand to depose the board members regarding their deliberations on his claim, the superior court quoted the U.S. Supreme Court for the proposition that

> inquiry into the mental processes of administrative decision makers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made.[130]

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[129] *Blanas v. Alaska Workers' Comp. Bd.*, 2004 WL 1637664 *7 (Jul. 21, 2004) (citing *United States v. Morgan*, 313 U.S. 409, 422-23, 61 S.Ct. 999, 85 L.Ed. 1429 (1941)). (quoting *Morgan v. United States*, 298 U.S. 468, 480, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1938)). The commission is indebted to Superior Court Judge L. Card for his analysis of this issue in his opinion affirmed by the Supreme Court. The Supreme Court did not adopt Judge Card's opinion on this issue because it was not required to reach the issue. *Id.* at *2 n.3. The commission is aware that *Blanas v. Alaska Workers' Comp. Bd.* is an unpublished decision. However, Appellate Rule 214(d)(1) provides that

> Citation of unpublished decisions in briefs and oral arguments is freely permitted for purposes of establishing res judicata, estoppel, or the law of the case. Citation of unpublished decisions for other purposes is not encouraged. If a party believes, nevertheless, that an unpublished decision has persuasive value in relation to an issue in the case, and that there is no published opinion that would serve as well, the party may cite the unpublished decision.

[130] 2004 WL 1637664 *8, (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (citing *United States v. Morgan*, 313 U.S. at 422)). Judge Card also cited as supporting analogous authority from other jurisdictions *Gilpin County Bd. of Equalization v. Russell*, 941 P.2d 257 (Colo.

The avoidance of inquiry into the mental process implies that the deliberations by the board's hearing panels are not a public process. Indeed, the board's action *excusing the parties* indicates the board believed that the parties were not entitled to observe the operation of their "mental processes."

The commission's circulating decision drafts are confidential as a matter of statute, AS 23.30.008(b); it follows that its verbal deliberations are also confidential. The board has no similar statute. However, if the hearing panel excludes the parties, it may not permit others to observe because the parties have no way of knowing if the audience comment or response affected the board's deliberations. Just as the parties to a court case have the right to be informed of communications with a jury,[131] the parties to an administrative adjudication have the right to be informed of communications with the board.

In *Storrs v. State Medical Bd.*, the Alaska Supreme Court held that confidential deliberations by a board that did not directly hear the evidence were not required to exclude the hearing officer who heard the evidence and provided a "formal, written proposed decision for [the board's] consideration" under AS 44.62.500(b).[132] But, that it not the case here. The workers' compensation officer and the hearing officers present in the hearing room had no role as fact-finders who had rendered a proposed decision for the board's consideration.

The commission does not assume that the persons present attempted to persuade the board to act one way or another. But, during deliberations that lasted some 40 minutes between the two people who made up the hearing panel, the possibility that a member of the audience contributed to the discussion is not unreasonable. Even the presence of a silent audience can affect the deliberations of a

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1997) and *RLI Ins. Co. Group v. Super. Ct.*, 51 Cal.App.4th 415, 59 Cal.Rptr.2d 111 (Cal.App.1996). *Blanas,* 2004 WL 1637664 at *8 n.26.

[131] *See Newman v. State*, 655 P.2d 1302, 1307 (Alaska App.1982). *See also Dixon v. State*, 605 P.2d 882, 884 (Alaska 1980); *Cox v, State*, 575 P.2d 297, 300-01 (Alaska 1977).

[132] 664 P.2d 547, 553 (Alaska 1983).

quasi-judicial body; members may avoid asking questions that may make them seem ignorant, avoid candor about their opinions on credibility, or be more resistant to compromise. For this reason, adjudicative bodies generally provide that their deliberations are confidential.

The right to know what communications have been made to the board hearing panel is fundamental; it is why *ex parte* communications are not permitted, why jury deliberations are confidential, and why the prosecuting agency's counsel is not allowed to sit with the board deciding the case.[133] The presence of three unauthorized persons for the duration of the deliberations in an unrecorded session closed to the parties, was prejudicial to the substantive rights of the parties and cannot be cured because there is no way to permit the parties to respond to anything the audience may have contributed. Therefore, while the degree to which those present may have participated is unknown, some impact of their presence on the conduct of the deliberating hearing panel may be assumed. The commission concludes the board's failure to exclude the audience from its deliberations was error.

4. Conclusion and order.

For the forgoing reasons, the board's order directing payment of temporary disability compensation to the employee, Michael Hope, pursuant to AS 23.30.155(d) in numbered paragraph 3, page 48, of Interlocutory Decision and Order No. 08-0212 is REVERSED. This case is remanded to the board to determine if a claim has been filed against the appellant Alcan Electrical and Engineering, Inc. If no claim has been filed against Alcan, then the board shall direct Redi Electric, Inc., to file a claim and seek joinder of the employee in the claim against Alcan pursuant to 8 Alaska Admin. Code 45.040(a).

The board's order granting a petition to join Alcan in numbered paragraph 1, page 48, of Interlocutory Decision and Order No. 08-0212 is MODIFIED to order

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[133] *In re Robson*, 575 P.2d at 774. AS 44.62.310, requiring all meetings of governmental bodies of the state to be open to the public, does not apply to "a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding." AS 44.62.310(d)(1).

consolidation of claims, if a claim is filed by Redi Electric against Alcan Electrical for compensation and benefits owed to the employee, Michael Hope, and if the board orders joinder of Michael Hope in Redi Electric's claim against Alcan Electrical. Compensation, including penalty on compensation, and any benefits paid by Alcan pursuant to the board's Interlocutory Decision and Order No. 08-0212, are subject to reimbursement by the employer found liable for temporary total disability compensation, and benefits owed to Michael Hope in a final determination of the merits of the consolidated claim for compensation and benefits. If the board finds that Michael Hope was not entitled to temporary total disability compensation during the period it was paid by Alcan Electrical pursuant to Interlocutory Decision and Order No. 08-0212, the compensation paid by Alcan Electrical pursuant to Interlocutory Decision and Order No. 08-0212 shall be considered an advance payment of other compensation to which Hope may be found liable in a final decision on the merits of Hope's consolidated claim.

The board's orders contained in numbered paragraphs 4, 5, and 6, page 48, of Interlocutory Decision and Order No. 08-0212 are REVERSED and VACATED.[134] The board may decide if a second independent medical examination is required under AS 23.30.095(k).

Date: *1 July 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[134] The commission's vacation of the board's order directing an SIME under AS 23.30.110(g) eliminates the need to address the appellants' claims of error regarding the board's appointment of Dr. McDermott as the SIME physician.

APPEAL PROCEDURES

This is a final decision on the merits of this appeal reversing and vacating part of the Alaska Workers' Compensation Board's Interlocutory Decision and Order No. 08-0212 and remanding the case to the board with instructions. This is not a final appeal on the merits of Michael Hope's claim for workers' compensation benefits. The claim has not been decided and it may not be affected by this decision. Because this is not the final decision on an appeal of a final board order, the Supreme Court might not accept an appeal under AS 23.30.129.

This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date this decision is distributed, look at the date in the box on the last page.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

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. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

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

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final 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 the Final Decision. 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).

CERTIFICATION

I certify this is a full and correct copy of the Alaska Workers' Compensation Appeals Commission's Final Decision No. 112 in *Alcan Electrical and Engineering, Inc., and*

Seabright Insurance Co., v. Michael Hope et al.; AWCAC Appeal No.08-031; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *1st* day of *July*, 20*09*.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on *7-1-09* a copy of this Final Decision in Appeal No. 08-031 was mailed to: P. Zobel, C. Croft & J. Cooper at the addresses above and faxed to: P. Zobel, C. Croft & J. Cooper, AWCB Appeals Clerk, & the Director WCD.

Signed
B. Ward, Deputy Appeals Commission Clerk