

Case: *State of Alaska, Department of Corrections vs. Scott A. Dennis, Earthworks, and Umiliak Insurance Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 036 (March 27, 2007)

Facts: The State sought extraordinary review of a decision by the board directing the Department of Corrections to pay benefits under AS 23.30.155(d) as the last employer who may be liable for compensation to Dennis. The State argued that this rule should not apply when the other employer asserts a statute of limitations defense because if the State pays temporary compensation and then it ultimately isn't liable, it may still not get reimbursed if the other employer establishes that the statute of limitations has run. An additional issue was the effect, if any, of an amendment to AS 23.30.010, which heightened the standard of legal cause of injury, on AS 23.30.155(d).

Applicable law: Former 8 AAC 57.076(a), repealed in 2011 (see below for an explanation).

The commission will grant a motion for extraordinary review if the commission finds the sound policy favoring appeals from final orders or decisions is outweighed because

(1) postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay, significant expense, or undue hardship;

(2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and

(A) the order or decision involves an important question of law on which there is substantial ground for difference of opinion; or

(B) the order or decision involves an important question of law on which board panels have issued differing opinions;

(3) the board has so far departed from the accepted and usual course of the board's proceedings and regulations, or so far departed from the requirements of due process, as to call for the commission's power of review; or

(4) the issue is one that otherwise would likely evade review, and an immediate decision by the commission is needed for the guidance of the board.

AS 23.30.155(d) provides in part that:

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, the most recent employer . . . who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

Issue: Should commission grant the motion for extraordinary review (MER)?

Holding/analysis: The commission concluded that this issue was not likely to evade review and was best addressed after the board's final decision and full fact-finding. The commission concluded that the delay would not work injustice. Commission nevertheless provided the following guidance to the board in anticipation of further proceedings.

- (1) "The language of AS 23.30.155(d) presumes that both employers have evidence overcoming the presumption, because it does not apply unless 'payment of temporary disability benefits is controverted.' Therefore, the board ought not to weigh the evidence at this stage, but confine itself to a determination of whether there was sufficient evidence to raise the presumption against both (or more) employers." Dec. No. 036 at 10. Thus, board correctly concluded it need not consider whether presumption was rebutted before ordering payment under AS 23.30.155(d).
- (2) "AS 23.30.155(d) is not applied only to 'last-injurious exposure' cases; it is applied in all those cases in which there is no dispute that the employee was injured in employment – and the only dispute is which employment is liable. The last injurious exposure rule is not a rule for determining the legal cause of disability. It is a rule for assigning responsibility for the disability between employers, thus avoiding apportionment of liability for payment among employers." Dec. No. 036 at 11. Commission noted .155(d) applies when only defense is that another employer is liable. If employer asserts other defenses, board should analyze whether these defenses are legally supportable before deciding that .155(d) does not apply. Commission observed that progression of scar tissue would not mean that neither employer is liable if the scar tissue was as a result of the surgery due to the previous work injury. Dec. No. 036 at 18.
- (3) "What has changed under AS 23.30.010(a) is the definition of 'a legal cause' . . . For a disability resulting from injury prior to Nov. 7, 2005, the employment is the legal cause if it is 'a substantial factor in bringing about the disability.' From November 7, 2005 forward, to be the legal cause of the disability the employment must be the substantial cause of the disability in relation to other causes. The definition of legal cause has changed, but this is not a change in the last injurious exposure rule itself. The rule still operates to prevent apportionment of liability of injury between employers." Dec. No. 036 at 11-12.
- (4) Employee must still show only a "causal link" to attach the presumption; new definition of legal cause does not change the degree of evidence required to attach the presumption. *Id.* at 14.

Notes: Dec. No. 032 (Feb. 2, 2007) denied recusal motion in this case.

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

Dec. No. 032 (Feb. 2, 2007) denied recusal motion in this case.