Alaska Workers' Compensation Appeals Commission

North Slope Borough,
Appellant,

vs.

Melvin Wood and State of Alaska,
Second Injury Fund,
Appellees.

Final Decision
Decision No. 048 July 13, 2007

AWCAC Appeal No. 06-017
AWCB Decision No. 06-0142
AWCB Case No. 199104596

Appeal from the decision of the Alaska Workers' Compensation Board, Decision No. 06-0142, issued June 1, 2006, by Fred Brown, Chair, Chris Johansen, Member for Industry and Jeff Pruss, Member for Labor.

Appearances: Robin Gabbert, Russell, Wagg, Gabbert & Budzinski for the appellant, North Slope Borough. Talis J. Colberg, Attorney General, and Richard Postma, Assistant Attorney General, for the appellee, State of Alaska, Second Injury Fund. Melvin Wood, self-represented appellee, not participating.

Commissioners: John Giuchici, Stephen T. Hagedorn, Kristin Knudsen.[1]

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

By: Kristin Knudsen, Chair.

The North Slope Borough has paid temporary total disability compensation and continues to pay permanent total disability compensation to Melvin Wood as a result of injuries he sustained as an employee in 1991. The Borough applied to the Second Injury Fund (SIF) for reimbursement of compensation paid to Wood, arguing that Wood's injuries fulfilled the requirements of AS 23.30.205. The SIF refused payment on the grounds that the Borough had not filed a Notice of Possible Claim form within the 100-week period required under AS 23.30.205(f).[2] The Alaska Workers' Compensation

[1] The commission regrets the short delay in issuing this decision owing to the absence from the state, and other limited availability, of commissioners on this panel during circulation of decision drafts.

[2] AS 23.30.205(f) provides:

Board denied the claim for SIF reimbursement, finding that the Borough's notice was untimely under AS 23.30.205(f). We find this conclusion of law was not supported by adequate factual findings. Having made no finding as to the time when the Borough first "had knowledge" of Wood's injuries for SIF purposes, the board could not have concluded that the Borough had exceeded the 100-week period beginning at that time. We remand the decision to the board for further findings, for the reasons set out below.

Factual background.

Melvin Wood suffered injuries to his left clavicle and right knee while working for the Borough on February 25, 1991.[3] After initial treatment, Wood suffered continuing neck pain. He was re-evaluated in January 1992, when an MRI scan revealed a small herniated disk at the C5-6 vertebrae in his neck and that his clavicular fracture had not healed.[4] He underwent surgery to repair his left clavicle in June 1992. Another surgery in June 1993 was done to fuse the C5-6 vertebral bodies in Wood's neck.[5]

The Borough paid medical benefits and temporary total disability compensation from February 26, 1991 to December 28, 1993 until temporary total disability compensation was voluntarily converted to permanent total disability compensation on May 18, 1993. The Borough continues to pay permanent total disability compensation.[6]

Board proceedings on the Borough's claim for SIF reimbursement.

The Borough filed notice of a potential claim to the SIF with the Department of Labor and Workforce Development on December 31, 2002. The SIF conceded on June

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

[3] *Melvin J. Wood v. North Slope Borough and Second Injury Fund*, AWCB Dec. No. 06-0142, 2 (June 1, 2006); R. 0580-0582.

[4] AWCB Dec. No. 06-0142 at 2.

[5] *Id.*

[6] *Id.*

8, 2003 that "osteophytes" or "osteophytosis" (with which Wood was diagnosed) is indicative of arthritis and therefore qualifies as "pre-existing impairment" under AS 23.30.205, and that the Borough's records satisfied the "written knowledge" requirements of AS 23.30.205(a).[7] On June 10, 2003, about ten years after the neck surgery, the Borough petitioned to join the SIF in proceedings before the board, requesting reimbursement from the SIF for qualifying compensation paid to Wood as a result of his February 21, 1991 injury.[8]

However, the SIF asserted, in a letter of July 22, 2003, that the Borough had not satisfied the requirements of the "combined effects" test of AS 23.30.205(a).[9] This was maintained in the Attorney General's letter of August 17, 2005.[10] The SIF also asserted that the Borough's December 31, 2002 notice of claim to the SIF[11] was untimely because Wood's medical records had revealed the "possible combined effects" of his pre-existing arthritis and his industrial injury to the Borough's adjuster several years before.[12] The parties now agree that the Borough met all requirements necessary to qualify for reimbursement from the SIF, except whether the Borough filed timely notice of a possible claim to the SIF under AS 23.30.205(f).[13]

Before the board, the Borough claimed it first learned of the "combined effects" of Wood's pre-existing arthritis and his industrial injury from Dr. Ticman on December 26, 2002.[14] The Borough filed notice of a potential claim to the SIF with the Department of Labor and Workforce Development on December 31, 2002.[15] The board

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7 AWCB Dec. No. 06-0142 at 3.

8 *Id.*

9 R. 0123-0124.

10 AWCB Dec. No. 06-0142 at 3. (The Attorney General entered an appearance for the SIF on June 24, 2005. R. 0281)

11 R. 0578.

12 AWCB Dec. No. 06-0142 at 3.

13 AWCB Dec. No. 06-0142 at 6.

14 AWCB Dec. No. 06-0142 at 7.

15 *Id.*, and R. 0020.

found that, *presuming December 26, 2002 was the first date* that the Borough learned of the "combined effects" of Wood's pre-existing arthritis and industrial injury, the December 31, 2002 filing was timely, fulfilling the requirements of AS 23.30.205(f).

However, the SIF cited many instances in which the medical records referred to Wood's osteoarthritis, osteophytic changes, spondylosis and neck pain and treatment. Particularly, the SIF referred to the Borough's own 1999 Employer Medical Examination report, which described Wood's spondylosis and associated cervical symptomology.[16] The SIF claimed that the medical record contains repeated references which should have led the Borough to recognize the possibility that it possessed a claim against the SIF, well before two years prior to its filing on December 31, 2002.[17]

The board's decision.

AS 23.30.205(f) requires that an employer file a notice of possible claim against the SIF with the Department for Labor and Workforce Development no later than 100 weeks after gaining knowledge of the "possibly SIF compensable harm to the employee."[18] The board found that the Borough was required to file a notice of possible claim prior to December 31, 2002[19] but made no finding as to when the Borough first "had knowledge" of a possible claim.

Arguments presented to the appeals commission.

The Borough argues that the board did not make sufficient factual findings to support its conclusion of law that the Borough's notice of potential claim to the SIF was filed late. The Borough argues that, under *Second Injury Fund v. Arctic Bowl*, the 100-week period set out in AS 23.30.205(f) runs from the date at which the "combined

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[16] R. 1696.

[17] AWCB Dec. No. 06-0142 at 7.

[18] *See, Second Injury Fund v. Arctic Bowl,* 928 P.2d 590, 594 (Alaska, 1996); *see also,* AWCB Dec. No. 06-0142 at 7.

[19] AWCB Dec. No. 06-0142 at 8. AS 23.30.205(f) states: "An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier have knowledge of the injury or death."

effects" test set out in AS 23.30.205(a) is satisfied[20] and that this date was never identified by the board. Therefore the board cannot come to the conclusion that the Borough's 100-week period had expired by the time the latter filed its notice on December 31, 2002.

The SIF argues, in essence, that such a factual finding is unnecessary. It argues that the board's finding that the medical record contained repeated references which *should have* led the Borough to recognize the *possibility* that it possessed a claim against the SIF, in other words, that the Borough had *constructive knowledge* of a *possible* claim against the SIF, was correct. The SIF argues that *Arctic Bowl* stands for the proposition that constructive knowledge of a possible claim is sufficient to trigger the 100-week period because reference is made to the "reasonableness" and "deduction" of injury,[21] and that similar phrases were used in *Cogger v. Anchor House*,[22] in which constructive knowledge was inferred. The board's findings seem to support the SIF's argument, therefore, the SIF argues, the board interpreted "any possible claim" as being necessarily wider than "any probable claim."[23]

The Borough argues that Mr. Monagle's letter of July 22, 2003 on behalf of the SIF to the Borough's attorney, Allen Tesche,[24] contains an admission that the "combined effects" test had not been met. The SIF argues that the wording of the letter is an indication of its then position that the "combined effects" test had not been met because there was no qualifying pre-existing injury under AS 23.30.205(a). The SIF argues that because AS 23.30.205(a) comprises one part of the "combined effects" test and this section had not been satisfied, it was also *necessarily* true that the "combined effects" test had not been satisfied.

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[20] 928 P.2d at 594: "An 'injury' does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met.... The mere knowledge that an injury has occurred does not suffice to trigger the 100-week notice period."

[21] 928 P.2d at 595.

[22] 936 P.2d 157, 160 (Alaska 1997).

[23] AWCB Dec. No. 06-0142 at 8.

[24] R. 0120-0121.

The Borough argues that, because the SIF's notice of potential claim form requires the employer to provide the date it learned of the "combined effects,"[25] the SIF is estopped from denying that it requires *actual knowledge* of the combined effects before notice of a possible claim can be given. The SIF argues that the form is not a statement of the law.

The commission's standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[26] We must exercise our independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[27] If we must exercise our independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, we draw upon the specialized knowledge and experience of the commission in workers' compensation,[28] adopting the "rule of law that is most persuasive in light of precedent, reason, and policy."[29] The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[30]

Discussion.

This appeal concerns the meaning of AS 23.30.205(f), which states:

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

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25 R. 0109; *see esp.* field number 12.

26 AS 23.30.128(b).

27 *Id.*

28 *See, 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).

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

30 *Land & Marine Rental Co. v. Rawls,* 696 P.2d 1187, 1188-89 (Alaska 1984).

The parties' dispute focuses on what is meant by "any possible claim" because the board's decision turns on the phrase "any possible claim." The board's comment regarding the SIF Form 6110, suggests that the board read "any possible claim" to mean one or more claims, however imperfect, regardless of quality, that might come into being. From the moment the employer knew or should have known of a possible claim, the board's decision suggests, the notice period *and* the 100-week filing period begin.

We conclude that this reading is inconsistent with the plain language of the statute and the Supreme Court's definition of "knowledge of an injury" in the same section of the statute: "'injury' does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met."[31] The statute requires that notice be given of "any possible" claim "as soon as practicable," but in no event later than 100 weeks *after* knowledge of the injury – not after knowledge of the possibility of a claim. Because an "injury" for SIF purposes occurs when the combined effects test is met, the 100 weeks that mark the outside limit for notice must begin *after* the combined effects test is met and after the employer's knowledge of the injury.

We begin our analysis with "any possible claim," a phrase that may be interpreted with differing shades of meaning. However,

> when a popular or common word is used in a statute, but is not defined, the word should be given its common meaning. Many cases state the rule in terms of a presumption favoring the common meaning in the absence of evidence that some other meaning intended or manifested. Where the word of common usage has more than one meaning, the one which will best attain the purpose of the legislature should be adopted...."[32]

We note that the purpose of the legislation is to provide reimbursement to employers who retain employees in employment despite prior qualifying conditions, thereby providing some protection against the risk that an injury that would not result in much disability to an employee without a qualifying disability will result in a substantially

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

[32] Singer, Norman J., *Sutherland Statutes and Statutory Construction* 354-357 (6th ed. 2000) (footnotes omitted).

greater disability in the retained employee. Certain restrictions placed on employers' claims serve to avoid litigation of disputed facts (such as the written record requirement) and to ensure the health of the SIF (a defined period for giving notice and limitations on the compensation that may be reimbursed).

With those purposes in mind, we examine the plain language of the statute. "Possible," in its most applicable adjectival form, is defined as either "falling or lying within the powers (as of performance, attainment, or conception) of an agent or activity expressed or implied: being within or up to the limits of one's ability or capacity as determined by nature, authority, circumstance or other controlling factor"[33] or "falling within the bounds of what may be done, occur, be conceived, or be attained within the framework of nature, custom, or manners."[34] We do not believe that the legislature intended the SIF to be flooded with remotely possible, unlikely, or frivolous claims, or those without some evidentiary support. A "possible" claim is one that lies within the limits determined by AS 23.30.205 or falls within the defined elements of a claim. Thus, a "possible claim" is not a "proved" claim; it is simply one that encompasses the basic elements of a right to reimbursement, without evidence of those elements having been put to the proof.[35] Turning to the preceding word, "any," it is defined most appropriately as "all: used as a function word to mean the maximum or whole of a number or quantity,"[36] as in "give me any letters addressed to Alaska." Taking the two words together, we find that "any possible claim" means "all claims that fall within the statutory framework of a claim or state the requisite elements of a claim."

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[33] *Webster's Third New International Dictionary (unabridged)* 1771 (Merriam-Webster Inc., 2002).

[34] *Id*.

[35] A "claim" in this section is used in the sense of a "right," not a written request for reimbursement. It refers to a demand of entitlement, of which notice must be given, not a document that must be filed. *Compare*, *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995).

[36] *Webster's Third New International Dictionary (unabridged)* 97 (Merriam-Webster Inc., 2002).

An employer has no obligation to give notice until a possible claim exists.[37] There must be some evidence of the elements of AS 23.30.205(a) to be a "possible" claim. As soon as practicable, an employer must notify the SIF of such possible claim. Thus, a possible claim is the starting point of obligation to provide notice. However, it is not the date "any possible claim" came into existence that defines the *outer* boundary of the notice period; the defining date is the date of knowledge of an injury for SIF purposes. The 100 weeks that defines the outer boundary of the notice period does not necessarily begin to run when the employer has notice of any possible claim, because a claim for reimbursement may be based on different theories of SIF injury.

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[37] The SIF (Appellee Br. 32-33) urges the commission to rely on *Cogger v. Anchor House,* 936 P.2d 157 (Alaska 1997) to hold that the date of knowledge of a "possible claim" is the date the employer had constructive knowledge of an injury. We agree that *Cogger* is helpful. For "reasons of fairness and based on the general excuse" in AS 23.30.100(d)(2), the Supreme Court read a "reasonableness" standard into AS 23.30.100(a) – i.e., that the 30-day period to give notice of injury begins to run when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Id.* at 160. Because the "exact date when an employee could reasonably discover compensability is often difficult to determine, and missing the short thirty-day period can bar a claim absolutely," for "reasons of clarity and fairness" the Court held the 30-day period begins "no earlier than when a compensable event occurs," *id.*, rejecting the argument that it begins when the full seriousness of the injury is known. The Court also held the statute excusing an employee's failure to give written notice did not require an employer have knowledge of the work-relatedness of the injury, only of the "injury, and no more." 936 P.2d at 161-62. We agree the employer is required to give notice as soon as practicable to the SIF when, by reasonable care and diligence it is discoverable and apparent that a possible claim for reimbursement exists. We also agree that it is sometimes difficult to know when the employer could "reasonably discover" a claim; and equally difficult to know when the combined effects test has been met. The *Cogger* analogy is not as helpful in crafting a solution to these difficulties. A *Cogger* solution results in the 100-week notice period beginning "no *earlier* than when a compensable event" occurs, by analogy, when the first reimbursement payment is due. The employer knows when it has paid two years of compensation, and the 100 weeks to file a notice of claim against the SIF would run from that date. As clear and attractive this solution, however, we are not persuaded that we may adopt it in view of the statute's provision that an employer may give notice *no later than* 100 weeks *after* knowledge of the injury and *Arctic Bowl.* Adoption of another standard may require regulatory or statutory change.

The date of knowledge of an injury for SIF purposes and the date of a possible claim may be the same in many cases. In this case, the Borough's claim is based on the combined effect of the pre-existing lumbar spine arthritis and later the neck and shoulder injury. If the Borough had immediate knowledge of the combined effects, then the 100-week period required by AS 23.30.205(f) ran from the time at which the "combined effects" test is met, concurrent with the existence of a possible claim. The notice period ends no later than 100 weeks from the time the Borough had such knowledge.[38] However, if a possible claim exists but the Borough had no knowledge of an injury for SIF purposes (no knowledge that the combined effects test is met), the Borough's obligation to give notice began with the existence of the possible claim but its opportunity to give notice ends 100 weeks after it knew of the injury for SIF purposes.

In this case, the board found that the Borough's notice was not timely without determining the "start date" of the 100 weeks, except to infer that it must have occurred before December 4, 2000 (100 weeks prior to December 31, 2002). We infer from the board's comments regarding "any possible claim" that the board found that the obligation to give notice of a possible claim began before December 4, 2000; that is that a possible claim existed before that date. We do not consider that the mere mention of arthritis in a single vertebra of the lumbar spine, *with nothing more*, must, as a matter of law, inform the employer that the combined effects of that lumbar spine arthritis, which had not resulted in disability, and the employee's later, and much more severe, neck and shoulder injury would result in substantially greater disability than the later injury alone would do. The date that the 100 weeks measuring the outer limit of the employer's opportunity to give notice began to run was not determined by the board. The finding of facts in workers' compensation proceedings is the role of the board, not of this commission. We therefore remand this case to the board to

[38] *Second Injury Fund v. Arctic Bowl,* 928 P.2d 590, 594 (Alaska, 1996): "An 'injury' does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met. . . . The mere knowledge that an injury has occurred does not suffice to trigger the 100-week notice period."

determine the date when the employer knew, or reasonably should have known, of the "combined effects" injury, and the 100 weeks measuring the outer limit of opportunity to give notice of a possible claim began to run.

We make no comment as to the legal significance of Mr. Monagle's letter of July 22, 2003 to Mr. Tesche, as it is unnecessary to do so in light of our decision to remand. Similarly, we do not consider whether the SIF is estopped from denying that *actual knowledge* of the combined effects of the pre-existing impairment and the subsequent injury is required, as the issue was resolved through our analysis of the statute.

Conclusion.

We VACATE the board's decision denying reimbursement. We REMAND this case to the board to find when the "combined effects" test was first met and the date when the Borough knew or reasonably should have known of it. The board is instructed to decide when the 100 weeks began to run, and when the opportunity to file a possible claim (based on combined effects) ended. Because the SIF conceded that Wood's disability was substantially greater as a result of the combined effects of his arthritis and subsequent injury, if the board finds that the Borough's notice of possible claim was filed within the limit of opportunity to file a claim for SIF reimbursement, the Board shall enter an order directing reimbursement by the SIF. We do not retain jurisdiction. The commission clerk shall return the record to the board within 45 days of this decision, if no proceedings for reconsideration or review of this decision are initiated.

Date: *July 13, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final administrative agency decision on the employer's claim for Second Injury Fund reimbursement. This is a final decision of the commission vacating the board's order and remanding the case to the board for further proceedings. The board may issue a final decision after the remand and the board's final decision then may be appealed to the commission. The effect of the commission decision is to allow the board to complete its proceedings and issue a final decision on the claim for Second Injury Fund reimbursement.

This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the employer's claim for reimbursement, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No final decision has been made whether the employer is entitled to reimbursement, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

You may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. The commission will accept fax filing of a motion for reconsideration.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 048 in the matter of North Slope Borough v. Second Injury Fund and Wood; Appeal No. 06-017; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *13th* day of *July*, 200*7*.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on *7/13/07* a copy of the above Decision in AWCAC Appeal No. 06-017 was mailed to Potsma, Wood & Gabbert and a copy was faxed to Potsma, Gabbert, AWCB Appeals Clerk, AWCB Fairbanks (Brown) and Director WCD.

Signed
L. A. Beard, Deputy Clerk