Alaska Workers' Compensation Appeals Commission

Chena Hot Springs, LLC, and Alaska National Ins. Co.,
Movants,

vs.

Barbara Elliott,
Respondent.

Memorandum Decision
Decision No. 026 January 11, 2007

AWCAC Appeal No. 06-037
AWCB Decision No. 06-0312
AWCB Case No. 200211911

Motion for Extraordinary Review of Alaska Workers' Compensation Board Decision No. 06-0312, issued November 24, 2006 by the northern panel at Fairbanks, William Walters, Chairman and Jeffrey R. Pruss, Member for Labor.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert, & Budzinski, for movants Chena Hot Springs, LLC, and Alaska National Insurance Co.; Michael J. Wenstrup, Esq., for respondent Barbara Elliott.

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

Commissioners: Jim Robison, Chris N. Johansen, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

This motion for extraordinary review was heard on December 28, 2006.[1] Chena Hot Springs requests review of a decision partially granting a petition to dismiss Elliott's

[1] The appeals commissioner for management assigned to this motion sat in the hearing of the case as a member of the board, but did not participate in deliberations, as he was appointed the next day to this commission. Commissioner Johansen's assignment was brought to the parties' attention, both by written notice of commissioner assignment and opportunity to object, and again by the chair at the hearing of oral argument. With the parties' agreement to commissioner Johansen's participation, the commission proceeded.

claims[2] and permitting Elliott to proceed on a claim for benefits from May 15, 2004, and continuing, based on her physician's discovery of a "new condition." We agree that the board's decision requires clarification. The board will be better able to clarify the nature of the Elliott's claim after the record has been developed. We believe that the ultimate termination of the litigation will not be advanced by extraordinary review because we anticipate that resolution of an appeal would necessarily require a remand for additional findings. Therefore, we deny the motion for extraordinary review.

Factual background and board decision.

Barbara Elliott was employed as a laundry worker at Chena Hot Springs. Elliott reported she injured her shoulders while dragging bags of wet towels across the floor on July 6, 2002. The employer paid workers' compensation benefits, including surgery on both shoulders, until all benefits were controverted on September 16, 2003. Elliott applied for, and began to receive, social security disability insurance. Elliott returned to her physician, Dr. Wade, in March 2004. In April 2004 an MRI scan revealed a torn rotator cuff in the left shoulder. On May 17, 2004, Dr. Wade surgically repaired the left shoulder. On April 20, 2006, Elliott filed a request for hearing. This was opposed promptly by Chena Hot Springs because Elliott had not filed a claim. On May 15, 2006, Elliott filed a claim for benefits. Chena Hot Springs petitioned to dismiss the claim as too late under AS 23.30.105(a).

The board issued a decision on the petition November 24, 2006. Although the board granted the petition as to benefits claimed by the employee from September 16, 2003 through May 14, 2004, it found the employee's claim for benefits after May 15, 2004, (two years prior to the date of the claim) was not barred by AS 23.30.105(a):

> The record contains no evidence after that date providing additional information concerning the employee's disablement or

[2] The board's decision is termed a final decision and order, and for Elliott it is final as to those of claims dismissed. Elliott would have the right to appeal the board's dismissal of her claims. Because Chena Hot Springs asks us to review the board's denial of its petition to dismiss a claim for benefits from May 15, 2004, which is not a final disposition of the parties' rights in the claim for benefits after May 15, 2004, Chena correctly filed a motion for extraordinary review of the board's decision.

> its relation to her work for the period between the Controversion on September 16, 2003 and Dr. Wade's treatment of a newly discovered condition in May of 2004. We find the employee waited beyond the two-year window to claim benefits for that period, and those claimed benefits are barred by AS 23.30.105(a).
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> However, Dr. Wade discovered a new condition in the employee's left shoulder, and treated it surgically on May 17, 2004. We find the condition identified by Dr. Wade in 2004 was latent, and potential medical and indemnity benefits related to that condition arose from the surgery of May 15, 2004. The employee filed a claim for those benefits on May 15, 2006. We find the employee's claim was filed within the two year period under AS 23.30.105(a) for benefits from May 15, 2004 and continuing. In accord with the Court's rationale in *Morrison-Knudsen Co. v. Vereen*[3] and *Leslie Cutting Inc. v. Bateman*,[4] we find that portion of the employee's claim for benefits from May 15, 2004 and continuing is not barred under AS 23.30.105(a).[5]

Chena Hot Springs then applied to the commission for extraordinary review, asserting the board erroneously determined that the employee had a "latent defect." Chena Hot Springs argues that postponement of review will result in unnecessary delay, significant expense, immediate review will accelerate termination of the litigation, and there is an important question of law on which there is substantial ground for difference of opinion. Elliott opposes, asserting that the board correctly applied *Leslie Cutting, Inc. v. Bateman* and *Aleck v. Delvo Plastics, Inc.*[6]

Discussion.

When we are asked to accept an appeal on motion for extraordinary review, we must determine if, before the board's final decision on a petition or a claim, the board's actions are so erroneous or unjust, so prejudicial to the requirements of due process, so likely to otherwise evade review, or reveal our guidance is needed to resolve conflict

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[3] 414 P.2d 536, 538 (Alaska 1966).

[4] 833 P.2d 691, 694 (Alaska 1992).

[5] *Barbara N. Elliott v. Chena Hot Springs, LLC,* AWCB Dec. No. 06-0312, 6 (Nov. 24, 2006).

[6] 972 P.2d 988 (Alaska 1999).

and materially advance the termination of the litigation, that the strong policy favoring appeals from final decisions is outweighed by the compelling circumstances presented by the motion.[7]

The issue presented to the commission by this motion is whether the board erroneously applied the "latent defect" exception to the statute of limitations in AS 23.30.105(a) that requires a claim to be filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement, or within two years of last payment of compensation.[8] The "latent defect" exception is contained in the last sentence of § 105(a): "It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding."

Chena Hot Springs focuses on the first part of § 105(a), arguing that because Elliott knew she was disabled, knew that it was related to her shoulder injury, and held

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[7] 8 AAC 57.076(a); *Berrey v. Arctec Services,* AWCAC Dec. No. 009, 8 (April 28, 2006).

[8] AS 23.30.105(a) provides as follows:

> The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease shall be four years from the date of injury, and the right to compensation for death is barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of the injury or death, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.

herself out to be disabled in order to obtain federal social security disability benefits, the "latent defect" exception does not apply and the two year statute of limitations expired on September 14, 2005, two years after the date she last received compensation. The board, Chena Hot Springs argues, did not have evidence on which to base a finding of latent defect. Not surprisingly, Elliott claims that until May 14, 2004, she had a "latent defect," and therefore her claim was within two years of the discovery of this condition. Chena Hot Springs replies that even if the recurrent tear was a "latent defect," the date of chargeable knowledge is March, 2, 2004, when Dr. Wade ordered an MRI scan because he believed Elliott had a recurrent tear of the left shoulder. Thus, the claim was filed more than two years after the date of chargeable knowledge of the "latent defect."

The difficulty presented in this case, as in many others involving the statute of limitations, is that § 105(a) measures time from onset of disability caused by injury, not the occurrence of an accident causing injury,[9] which are events that may be separated by years. The first measure of time to file a claim for compensation is that a claim must be filed within two years after (1) disablement, (2) knowledge of the nature of the disability, and (3) knowledge of its relationship to the employment.[10] If compensation for disability has been paid without an award, the employee has two years after the last receipt of compensation to file a claim. This provision measures time from the end of voluntarily compensated disability.

Latent defects provide a means of escaping time limitations, because if a latent defect causes (or is alleged to cause) disability, the injured employee has "full right to claim as shall be determined by the board, time limitations notwithstanding." The Supreme Court's definition of "latent defect" conflates both disability and injury events:

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[9] *Morrison-Knudsen Co. v. Vareen*, 414 P.2d 536, 540 (Alaska 1966).

[10] The Supreme Court ruled that the four-year cap on the time to file a claim that ran from the date of the injury was effectively repealed by the 1962 amendment, § 6 ch 42 SLA 1962, adding the last sentence of AS 23.30.105(a). *W.R. Grasle Co. v. Alaska Workmen's Comp. Bd.,* 517 P.2d 999, 1002 (Alaska 1974).

> It appears clear to us, however, that by "defect" the legislature intended "injury". The term "latent injury" has a generally accepted meaning, and we hold in accordance therewith that an injury is latent so long as the claimant does not know, and in the exercise of reasonable diligence (taking into account his education intelligence and experience) would not have come to know, the nature of his disability and its relation to his employment. This test is identical to the one set forth in the first sentence of AS 23.30.105(a) which determines the commencement date of the two-year statute.[11]

In *Stancil v. Massey*,[12] cited by the Court, the federal Circuit Court of Appeals was asked to construe the term "injury" in the Longshoremen and Harbor Workers' Compensation Act statute of limitations.[13] It began:

> Thus, the history and the dictionary both teach that 'injury' is not to be tied to the fixed point of the 'accident' (or equated with 'disability'). We think that the canon of liberal construction then instructs that 'injury' should encompass physical harm of a kind which is unknown to the employee at the time of the accident but which is later revealed, such as an occupational disease or a latent wound.[14]

The federal court then refined its definition of latent injury to mean more than physical harm:

> the workman should not dawdle too much in filing a claim once he knows (or should know) that there is something wrong with him of a nature which will potentially affect his ability to earn his preexisting wage (whether or not it has already had that effect). . . . In short, once the man has been put on the alert (i.e., once he knows or has reason to know) as to the likely impairment of

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[11] *W.R. Grasle Co. v. Alaska Workmen's Comp. Bd.,* 517 P.2d 999, 1002 (Alaska 1974) (*Citations omitted*).

[12] 141 U.S. App. D.C. 120; 436 F.2d 274 (1970).

[13] 33 U.S.C. § 913(a) (1964) (The statute begins "Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death.")

[14] 141 U.S. App. D.C. at 122; 436 F.2d at 276.

> his earning power, there is an injury; before that time, while there may have been an accident, there is as yet no "injury" for claim or filing purposes under this statute.[15]

Given the Alaska Supreme Court's reliance on *Stancil v. Massey* and similar cases, and its statement that the test is "identical to the one set forth in the first sentence" of § 105(a), we must infer that the Supreme Court meant by "latent injury" a lack of knowledge, or reason to know, one of the three triggers in the first sentence of § 105(a): (1) disablement, (2) knowledge of the nature of the disability, and (3) knowledge of its relationship to the employment.[16]

Reviewing the Alaska Supreme Court decisions on the statute of limitations, we note that some establish latency because the employee was not disabled;[17] some because the employee did not know the nature of the disability;[18] and some because

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[15] *Id.* at 123, 277.

[16] Compare this to the discovery rule applied to Alaska's tort statute of limitations, which states that a plaintiff's claim accrues at the time that he discovers, or reasonably should discover, all of the elements of his cause of action. *Spoko v. Dowell Schlumberger, Inc.,* 21 P.3d 1265, 1270 (Alaska 2001).

[17] *E.g., Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1290 (Alaska 2001) (employee had actual knowledge of his disability and its relation to his employment when he received letter with diagnosis of chronic asbestos pleuritis in 1990, combined with his belief that he was exposed to asbestos when working for employer in 1963); *Egemo v. Egemo Constr. Co.,* 998 P.2d 434, 439 (Alaska 2000) (Employee's 1967 varus deformity was latent injury until earning impairment combined with medical condition); *Leslie Cutting, Inc. v. Bateman,* 833 P.2d 691 , 694 (Alaska 1991) (described below).

[18] *E.g., Aleck v. Delvo Plastics, Inc.,* 972 P.2d 988, 991 (Alaska 1999) (Claim based on latent injury where claim was for 50 percent permanent partial disability of upper extremity based on increased symptoms, numbness and breaking blood vessels in arm, occurring about twenty years after thumb was punctured by staple.); *Dafermo v. Municipality of Anchorage,* 941 P.2d 114, 119 (Alaska 1997) (described below); *Leslie Cutting, Inc. v. Bateman,* 833 P.2d 691 , 694 (Alaska 1991) (Allergy-caused disability is latent until employee learned allergy could not be controlled by medication and he would be unable to work in woods); *W. R. Grasle Co. v. Alaska Workmen's Comp. Bd.*, 517 P.2d 999, 1004 (Alaska 1974) (Injury in 14-foot fall latent until employee was disabled in 1971 and physician found additional injuries that were permanent); *Morrison-Knudsen Co. v. Vereen*, 414 P.2d 536, 541 (Alaska 1966) (25-year-old laborer

the employee did not know of the relationship between the employment and the disability.[19] Thus, even if Elliott knew she was disabled, and that there was a relationship between the disability and the employment, if there is some evidence that Elliott did not know, or have reason to know given her education, intelligence and experience, the nature of her disability, she *may* have a claim for a latent injury.[20]

We agree that the board's decision is unclear. The board suggests that Elliott's claim is based on a new injury, allegedly related to the work-injury ("Dr. Ward discovered a new condition") or that the nature of a latent injury was newly discovered ("newly discovered condition"). It would have been helpful if the board had named or described the condition, and cited to the evidence it relied upon.

Possibly the board refers to the recurrent rotator cuff tear first diagnosed in March 2004 and operated on May 17, 2004 as a "latent injury." The board, looking to the May 14, 2004, admission report, may have found this was the date the employee knew of a latent injury. The evidence presented with this motion, and cited in the board's decision, is not clear as to when the employee knew, or had chargeable knowledge, of the recurrent rotator cuff tear. However, without an explicit finding of fact giving the date Elliott had actual or chargeable knowledge of the nature of her

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with twelfth grade education not expected to realize herniated intervertebral disc and permanent disability were related to back injury until so informed by physicians).

[19] *E.g., Dafermo v. Municipality of Anchorage,* 941 P.2d 114, 119 (Alaska 1997) (Claim was for a latent injury where employee, who quit employment in 1988 due to vision problems, did not receive accurate diagnosis of eye problem and indication of possible work relatedness until 1991). *Morrison-Knudsen Co. v. Vereen*, 414 P.2d 536, 541 (Alaska 1966) (described above).

[20] We note that in denying dismissal of a claim, the board is not accepting the claim as valid. The board simply determines whether the employee has made out sufficient allegations, supported by some evidence, for a prima facie claim within the statute of limitations.

disability, it is impossible to determine whether her claim was filed within two years of that time.[21]

If the board was describing a new injury discovered in Dr. Wade's surgery, it may have meant the biceps tendon tear discovered by Dr. Ward during the May 17, 2004 surgery.[22] However, because the board did not describe the "new condition" Dr. Wade found, or make a finding of fact giving the date Elliott had chargeable knowledge of the "new condition," it is impossible to determine if this is the claim allowed by the board. Without adequate and explicit findings of fact, we cannot infer what the board meant: that a claim for a "new injury," or that a claim for a "latent injury," was encompassed in the claim it found to be timely.[23]

These questions are better answered by the board after the evidence is further developed. If we undertook review at this time, we would be certain to remand to the board for further findings of fact. For this reason, we believe that review by this commission would not advance the termination of the litigation, but would prolong it. If the evidence supports an earlier date of chargeable knowledge of the employee's claim, the employer may renew its petition to dismiss the allowed claim once the nature of Elliott's claim is better defined.

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[21] *Wade v. Anchorage School Dist.,* 741 P.2d 634, 641 (Alaska 1987). We note that the two years from May 14, 2004, expired on a week-end, so that the last day of the two-year period was the following Monday. If there is evidence that the date of chargeable knowledge is earlier, the board did not state why it rejected it.

[22] Elliott does not contend that the surgery itself constituted a "new injury."

[23] We note that the board's dismissal as untimely of the claim for benefits controverted September 16, 2003, suggests that the board allowed the claim to proceed under a "new injury" theory rather than "latent injury" theory, because the employee has a "full right to claim" under a latent injury theory.

Except where otherwise provided by law, the legislature prefers that claims be decided on their merits.[24] This does not mean that the board ought to stretch the law beyond recognition, or ignore evidence, so as to preserve untimely claims. The Alaska Supreme Court said that it is not clear why it would be inequitable to deny compensation to an employee who has failed to adhere to the filing requirements of AS 23.30.105(a).[25] The board found in this case that the employee failed to adhere to the filing requirements of § 105(a) because it dismissed the claim for continuing benefits based on disability controverted in September 2003, yet it excepted from dismissal some part of Elliott's claim.[26] While we do not grant extraordinary review, in view of our assessment that the board's decision is not clear, we urge the board at a time prior to a hearing on the merits to spell out more exactly the claim it allowed to proceed and the nature of the injury it is based upon.

Conclusion.

Although the board's decision is not clear, an appeal at this time would not accelerate the ultimate termination of the litigation. It is not possible to say whether or not the board erroneously applied the statute of limitations in AS 23.30.105(a), as the board's findings of fact lack an explicit date of chargeable knowledge of latent injury or description of new injury. Thus, any appeal would necessarily require a remand for further findings of fact by the board. The board may be in a better position to correct

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[24] AS 23.30.001(2).

[25] *Fairbanks North Star Borough v. Rogers and Babler,* 747 P.2d 528, 533 (Alaska 1987).

[26] Elliott did not file multiple claim forms, but a single claim for "Temporary total disability [compensation] from unknown to present" and "Permanent total disability [compensation] from unknown to present." Ex.21, *Workers' Compensation Claim*, May 15, 2006, attached to Motion for Extraordinary Review; *Barbara N. Elliott v. Chena Hot Springs, LLC,* AWCB Dec. No. 06-0312, 3 (November 24, 2006).

these deficiencies after further development of the record. Therefore, we DENY the motion for extraordinary review.

Date: *11 January 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Chris N. Johansen, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on this motion for extraordinary review from the board's decision and order. However, it is not a final decision on whether the employee's claim is compensable and the employer must pay benefits. The effect of this decision is to allow the board to continue proceedings to reach a final decision on those claims the board did not dismiss. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

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 merits of the claim, the Supreme Court 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. No decision has been made on the merits of the underlying claim, but if you believe grounds for review of the commission's decision on this motion for extraordinary review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

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

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue

an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. The commission will not hear a motion for rehearing on denial of a motion for extraordinary review. 8 AAC 57.076(b).

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision on Motion for Extraordinary Review, AWCAC Dec. No. 026, in the matter of *Chena Hot Springs, LLC and Alaska National Ins. Co. v. Barbara Elliott*; AWCAC Appeal No. 06-037, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *11th* day of January, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No. 06-037 was mailed on *1/11/07* to R. Wagg & M. Wenstrup at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, AWCB-Fbks, R. Wagg & M. Wenstrup.

Signed *1/11/07*
L. Beard, Deputy Clerk Date