Alaska Workers' Compensation Appeals Commission

Kuukpik Arctic Catering, L.L.C., and
Alaska National Ins. Co.,
Movants,

vs.

Lily M. Harig,
Respondent.

Memorandum Decision
Decision No. 038 April 27, 2007

AWCAC Appeal No. 06-040
AWCB Decision No. 06-0313
AWCB Case No. 200028980

Motion for Extraordinary Review from Alaska Workers' Compensation Board Decision No. 06-0313 issued November 24, 2006 by the northern panel at Fairbanks, William Walters, Chairman, Jeffrey P. Pruss, Member for Labor.

Appearances: Theresa Hennemann, Holmes, Weddle & Barcott, P.C., for movants Kuukpik Arctic Catering, L.L.C., and Alaska National Insurance Co. Lily Harig, pro se, respondent.

Commissioners: John Giuchici, Philip Ulmer, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Kuukpik Arctic Catering, L.L.C., and Alaska National Ins. Co. (Kuukpik) filed an appeal of the board's Decision No. 06-0313[1] and asked for a stay of the board's decision. The commission scheduled a hearing on the motion for stay. Despite notice to her address of record, and attempts to reach her by telephone, Ms. Harig did not appear at the hearing scheduled on the motion to stay, and filed no written opposition to the appeal or the motion to stay. Although Ms. Harig had not objected to the appeal, the commission chair brought to Kuukpik's attention that the board decision

[1] *Lily Harig v. Kuukpik Arctic Catering, L.L.C.,* AWCB Dec. No. 06-0313 (November 24, 2006) (granting in part and denying in part a petition to dismiss the workers' compensation claim).

Kuukpik appealed was titled "interlocutory decision" and that appeals must be from final decisions. We rejected Kuukpik's argument that the board's decision on its petition to dismiss Ms. Harig's claim was a final order subject to appeal. Without excusing the late filing, we permitted Kuukpik to convert the appeal to a motion for extraordinary review.[2] Ms. Harig then contacted the commission to request additional time to object to the motion for extraordinary review. We granted her additional time and she filed a written objection to the motion. She also appeared and argued forcefully at the hearing against the motion for extraordinary review.

Factual background and board proceedings.

We summarize here the facts recited by the board in its decision for the purpose of setting the motion for extraordinary review in context. Ms. Harig reported she injured her elbow while vacuuming as a housekeeper on the North Slope on June 4, 2000. She continued to work, but developed symptoms in her shoulder. She was diagnosed with impingement syndrome and degenerative joint disease in the right acromioclavicular joint.[3] Her physician began to discuss possible arthroscopic surgery to "decompress" the joint in May 2002. Kuukpik sent Ms. Harig to an employer medical examination in July 2002. The examiners diagnosed chronic pain in the right shoulder, but found no objective evidence of an injury related to the reported June 4, 2002 work incident of injuring her elbow while vacuuming. They reported that any bruise or strain she may have suffered was fully resolved, she required no more treatment for the work injury, her condition was medically stable and the work injury caused no permanent impairment. Kuukpik filed a controversion of all benefits on June 25, 2002.

Ms. Harig filed a claim on July 15, 2002 based on the June 4, 2000 injury. Kuukpik filed an answer and a controversion notice August 14, 2002. In a pre-hearing

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[2] Order on Mot. to Stay, January 17, 2007. At hearing on Kuukpik's motions, counsel conceded that the employer could have filed a motion for extraordinary review from the board's decision. She suggested that confusion during a period of adjustment to the commission process led Kuukpik to file an appeal instead.

[3] The acromioclavicular (AC) joint is located at the top of the shoulder where the acromion process and the clavicle (collar bone) meet to form a joint.

conference November 13, 2003, Ms. Harig amended her claim to include additional disability compensation, reemployment benefits, and more medical costs. In that conference, the pre-hearing officer ordered a Second Independent Medical Examination (SIME) pursuant to AS 23.30.095. The examiner, Dr. Gritzka, reported in February 2004 that the Kuukpik work, specifically overhead cleaning, had produced persistent symptoms and was a substantial factor in Ms. Harig's disability and need for subacromial decompression surgery.

At a pre-hearing conference on April 29, 2004, the pre-hearing officer notified Ms. Harig that her claim[4] would be barred if a hearing was not requested within two years of the controversion. She mailed Ms. Harig a form for requesting a hearing. Ms. Harig had the decompression surgery on her right shoulder in July 2004, but did not send copies of the medical bills and records to Kuukpik's adjuster. She filed her request for hearing on June 7, 2006, almost four years after Kuukpik filed its controversion of all benefits. On June 19, 2006, Kuukpik petitioned to dismiss Ms. Harig's claim, asserting it was barred by AS 23.30.110(c). At a pre-hearing conference held July 18, 2006, the employee again amended her claim.

Kuukpik filed an affidavit of readiness for hearing on its petition on July 18, 2006. The board heard the petition to dismiss on November 9, 2006. The board's decision granted Kuukpik's petition to dismiss Ms. Harig's July 15, 2002 claim as to temporary disability compensation from August 14, 2000 to August 5, 2001, permanent disability compensation due by July 15, 2002, and medical benefits to July 15, 2002; but permitted Ms. Harig's claim for compensation and benefits subsequent to July 15, 2002, "as raised in the November 13, 2003 and July 18, 2006 Prehearing Conference Summaries" to go forward to hearing.[5]

Discussion.

The commission's authority to review interlocutory orders is limited. We do not exercise that authority lightly. Extraordinary review is appropriate only in circumstances

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[4] Ms. Harig amended her claim again during the pre-hearing conference.

[5] *Lily Harig,* AWCB Dec. No. 06-0313 at 10.

where the board's actions are so erroneous or unjust or so prejudicial to the requirements of due process that immediate review is necessary; or where postponement of review will result in injustice, unnecessary delay, significant expense or undue hardship; where immediate review may materially advance the termination of the litigation and the decision involves an important question of law on which there is substantial ground for difference of opinion or the board has issued differing opinions; or in cases involving issues that would likely otherwise evade review and an immediate decision is necessary to guide the board.[6]

Kuukpik argues that the northern panel of the board has departed from the practice and procedures of the board by dismissing only part of Ms. Harig's 2002 claim, by finding that the amendments to the claim, noted in pre-hearing conference

[6] 8 AAC 57.076(a) provides:

> The commission will consider and decide a motion under this section as soon as practicable. 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
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> (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;
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> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> > (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;
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> (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
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> (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.

summaries, were "new claims." Kuukpik argues that resolving the issue whether any part of Ms. Harig's amended claim survived the two-year time-bar in AS 23.30.110(c) will advance the ultimate resolution of the claim, as well as provide guidance to the board. Kuukpik argues that the board panels have issued different decisions in like instances. Kuukpik also argues that the matter will evade review because if it succeeds in the ultimate claim before the board, there is no incentive to seek review of the board's decision; but if it does not win before the board, even if it is successful on appeal it will have expended resources in defense of the claim it cannot recover.

Ms. Harig objects to the commission reviewing the board's decision. She believes that her claim ought not to be defeated by the insurer using "procedure" against her because she is unrepresented. She has had problems in her life that have distracted her from pursuing her claim. She argues that the board has the authority to do what is needed to ensure that workers have their claims heard and are not "punished" for their lack of understanding or for delays they could not avoid. Ms. Harig also argues that she was told by a division of workers' compensation employee that she had two years from the date of the shoulder surgery to request a hearing, and that she should be able to rely on what she was told. She does not believe a hearing on her claim for medical benefits should be delayed any longer, which is what would happen if we allowed the employer to appeal the board's decision. She urges us to allow the board to issue a decision on her claim and not to grant review.

The Alaska Supreme Court has held that the word "claim" in AS 23.30.110(c) means "a written application for benefits filed with the Board" rather than the right to compensation.[7] Thus, "section 110(c) requires an injured employee to request a hearing within two years after he files a written application for benefits which is denied

[7] *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995). *See also, Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 912 n. 4 (Alaska 1996) ("In *Doyon Drilling,* we held the word 'claim' in section 110(c) refers only to the employee's written application for benefits, not the employee's right to compensation."); *Egemo v. Egemo Constr. Co.*, 998 P.2d 434, 439 (Alaska 2000) ("A 'claim' is a written pleading that is filed, and is distinct from the employee's right to compensation.").

by the employer."[8] Until the employee files a claim, any controversion by the employer does not begin this limitation period.[9] In *Bailey v. Texas Instruments, Inc.*,[10] however, the court considered a case in which the board had somewhat confused what is a "claim" and what is an "amendment." Bailey was injured in 1981 and settled his claim, preserving his right to claim future medical benefits. In 1997, the employer controverted various pharmacy expenses based on an employer medical evaluation. Soon afterward, Bailey filed a written claim for payment of the prescriptions, and the employer filed a controversion. In October 1999, Bailey filed another written claim, contesting the continuing refusal to pay the benefits. The employer controverted, asserting, in addition to other reasons, that the claim was barred under AS 23.30.110(c). In a pre-hearing conference two months later, the court states,

> [t]he hearing officer assumed that Bailey's 1999 claim amended his 1997 claim. Because the hearing officer recognized that Bailey was not represented by an attorney and might not have understood the two-year statute of limitations for requesting a hearing, she explained that Bailey needed to request a hearing within two years. In addition, she apparently restarted the statute of limitations clock, giving Bailey two years from the October 13 [1999] controversion to submit his request for hearing.[11]

In May 2001, Bailey filed another claim, this time for medical expenses incurred after 1997. The employer filed a controversion. In July 2002, Bailey filed a request for hearing.

The Supreme Court said that "[n]ormally, Bailey's failure to request a hearing on his 1997 claim by October 2, 1999 would require that this claim be dismissed."[12] But, the hearing officer "treated Bailey's 1999 claim as an amendment of the 1997 claim

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8 *Jonathan,* 890 P.2d at 1124.

9 *Id.* at 1125.

10 111 P.3d 321 (Alaska 2005).

11 *Id.* at 323.

12 *Id*. at 324.

and, to avoid any possible confusion on the issue, apparently gave Bailey two *more* years from the October 13, 1999, controversion to request a hearing."[13] (Emphasis added). Nevertheless, because Bailey did not file within two years of the controversion of the 1999 claim, both the 1997 and 1999 claims were properly dismissed.[14]

This case presents circumstances that pose the "possible confusion on the issue" avoided by the pre-hearing conference officer in *Bailey.* The written application for benefits was filed in July 2002. Ms. Harig's claim was amended verbally in the course of later pre-hearing conferences, but the board did not find, as occurred in *Bailey*, that the pre-hearing conference officer "restarted the statute of limitations clock" by her notations in pre-hearing conference summaries.[15] Instead, the board determined that some of the verbal amendments of the 2002 claim were "new claims" that had not been controverted, and so the "clock" had not begun to run on them; the "clock" did not run on an unripe claim requested in a time-barred written claim; and claims raised by amendment after the employer asserted the time-bar defense to a written claim were not barred. These board interpretations seem to conflict with the Supreme Court's repeated statements that "claim" in section 110(c) refers to a written application for benefits that is filed by the employee.[16]

We are concerned that the board may have disregarded its regulations as well as the statute. The board's regulations state that "a claim is a written request for benefits."[17] A claim must contain certain information and "be signed by the claimant or

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[13] *Id*.

[14] *Id*.

[15] The May 21, 2004 pre-hearing conference summary by workers' compensation officer Joireen Cohen refers only to "Employee's 7/15/2002 workers' compensation claim." Appellant's Ex. 5 to Motion for Stay.

[16] AS 23.30.105(a) and AS 23.30.110(b) both state a claim "is filed." AS 23.30.110(b) requires the board to "notify the employer" "that a claim has been filed" by serving the notice personally on the employer or by registered mail.

[17] 8 AAC 45.050(b)(1).

a representative."[18] A claim must be served by certified mail on the employer by the board, but the board will not serve an incomplete claim.[19] When an employer receives a claim, it must file an answer[20] and a controversion to start the clock on the two-year time-bar in AS 23.30.110(c). Unlike the circumstances described in *Bailey,* the board's decision does not reflect a finding that the employer and the employee were put on notice by the pre-hearing officer that the verbal amendments by the employee constituted "new claims" for purposes of AS 23.30.110(c) and that employer was obliged to re-controvert the new claims to start the time-bar clock, to re-assert any affirmative defenses against them, or to assert a statute of limitations defense if applicable.

8 AAC 45.050(e) permits a party to amend a pleading, including a claim, at any time before an award "upon such terms as the board or its designee directs." But, if the amendment "arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading."[21] This language is also found in Alaska Rule of Civil Procedure 15(c), which is designed to allow liberal amendment of an action so as to preserve claims from the statute of limitations.[22] The Supreme Court has had, so far as we may find, no opportunity to construe this language in the context of a workers' compensation claim. However, it has said of this rule that:

> It is somewhat inconsistent to conclude that after the limitations period has run plaintiff may allege *an additional claim for relief* arising from the conduct, transaction or occurrence involved in

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[18] 8 AAC 45.050(b)(4)(A-B).

[19] 8 AAC 45.050(b)(4).

[20] 8 AAC 45.050(c).

[21] 8 AAC 45.050(e).

[22] *Magestro v. State*, 785 P.2d 1211, 1213 (Alaska 1990). ("The fact that *a new legal theory or new claim is advanced in the amended complaint*, based on the same factual occurrence set out in the original complaint, has not heretofore been considered a reason for denying leave to amend under Rule 15(c).") (Emphasis added.)

> his original claim and that it will relate back under Rule 15(c), yet deny defendant an analogous opportunity by deciding that a compulsory counterclaim will not relate back.[23] (Emphasis added.)

The board avoided relating Ms. Harig's 2003 and 2006 amendments back to the original claim in order to save them from the time-bar in AS 23.30.110(c), but neglected to say whether the statute of limitations in AS 23.30.105[24] applies, as it may have applied to a new written claim filed in July 2006. Instead, the board held that because the employer had not controverted these new claims, the time-bar did not begin to run, denying the defendant the "analogous opportunity" to renew its original controversion of all benefits in the course of the pre-hearing conference.

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[23] *Estate of Thompson v. Mercedes-Benz, Inc.,* 514 P.2d 1269, 1273-74 (Alaska 1973).

[24] AS 23.30.105 provides in pertinent part:

> (a) 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.
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> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

Other board panels have issued decisions dismissing an employee's claim when an employee failed to file a request for hearing within two years of a valid notice of controversion and we have affirmed such dismissals. In *Morgan v. Alaska Regional Hospital,*[25] we affirmed the south-central panel's dismissal of the employee's amendments that the panel related back to the original claims and dismissed as time-barred under AS 23.30.110(c). The northern panel's decision appears to be a departure in the board's general practice and procedure of relating verbal amendments in pre-hearing conferences back to the original claim, as well as written amended claims, in order to preserve them from falling to the statute of limitations in AS 23.30.105(a). The board's decision in this case fails to explain why its regulations, AS 23.30.110(b), and the Supreme Court's repeated holdings that a claim for purposes of AS 23.30.110(c) is a written pleading filed by the employee, do not apply to Ms. Harig's new claims.

Ms. Harig urges us not to take up review because it will delay resolution of her claim. However, Ms. Harig delayed nearly two years to file a request for hearing that would have avoided the time-bar. If this matter is appealed on the same grounds after a final order from the board, her case would be subject to the same delay. Ms. Harig also urges us not to take up review because to do so would be to thwart her right to a hearing because the employer is using "procedure" against her. Ms. Harig does not recognize that the board's decision to permit some of her claims to be heard rests on the board's interpretation of a point of procedure to rule against Kuukpik. Hearings in workers' compensation cases cannot be fair and impartial to all parties[26] if the procedure leading to the hearing is not fair and impartial.

Because the northern panel's decision appears to be a significant departure from the board's usual course of proceedings and regulations, we are strongly inclined to grant extraordinary review. We note as well the conflict in board panel decisions. However, we are constrained by our limited powers to grant extraordinary review only when a motion for review meets the standards set out in our regulations. In this case,

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[25] AWCAC Dec. No. 035 (February 28, 2007).

[26] AS 23.30.001(4).

the motion (converted from the notice of appeal) was filed more than 10 days after the board's decision was issued. We may order time periods that differ from time periods in our regulations if strict adherence to the time periods established by regulation would "work injustice" *and* the change would "advance the prompt, fair, and just disposition of appeals." 8 AAC 57.270(a).

When we examine a board decision for extraordinary review, we do so without the full record and hearing transcript. We cannot know all the facts before the board, so we act cautiously. We exercise restraint when we consider motions for extraordinary review in order to avoid officious intermeddling in the board process. We do not use extraordinary review to intervene merely because we think the board may have made an error.[27] We recognize that our power to exercise extraordinary review is limited. We, like the board, are an administrative body with only such powers as have been granted to us by the legislature. The issue raised here concerns the board's lack of "strict adherence" to its regulations and the statutes. We set a poor example if, as we undertake review, our own adherence to regulation may be questioned.

Although Kuukpik presents a strong case of possible error by the board, we cannot say that it will work injustice to adhere to our regulations and defer review of these questions until an appeal is filed from a final order. Kuukpik has clearly preserved its objections for an appeal. As we said in our January 17, 2007 order, Kuukpik may appeal the board's order, if it has not become moot, once a final board decision is made on Ms. Harig's remaining claims. On the other hand, Ms. Harig is not represented. The concept of relating back amendments, and the interplay of statute, case law, and regulations, are not readily mastered by an inexperienced claimant. By deferring review, we permit the board panel to consider our expressed concerns and respond to them, rather than requiring Ms. Harig to interpret and defend the decision now.[28] We

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[27] We caution that our grant or denial of a motion for extraordinary review should not be interpreted as disapproval or approval of the board's decision.

[28] From the board's decision, it does not appear that Ms. Harig argued that she "filed" new claims.

cannot say in these circumstances that allowing an appeal from the board's interlocutory order will advance the fair and just disposition of appeals.

Conclusion.

Kuukpik presented important issues related to the board's allowance of amendments as new claims filed in 2006 and 2004, which appear to be a significant departure from the board's usual course of proceedings and regulations. The question of whether an employee's verbal amendments of a written claim in the course of pre-hearing conferences, as recorded by the pre-hearing officer, satisfy the requirement for a written claim for benefits under 8 AAC 45.050(b) and AS 23.30.110(c), as interpreted by the Alaska Supreme Court, and so trigger the employer's obligations to answer and controvert a new claim, is a significant question. We note as well a conflict in board panel decisions in this area. However, because we cannot find that adherence to 8 AAC 57.072(a) would work injustice and that extending the time period for filing a motion for extraordinary review will promote a fair and just disposition of this appeal, we DENY the motion for extraordinary review.

Date: ___*27 April 2007*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on whether the commission will grant extraordinary review of the board's interlocutory (non-final) decision. This is a not a final decision on the merits of the workers' compensation claim. The effect of this decision is to send the case back to the board, where the claim may proceed to a final decision by the board. 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 commission decision on the merits of an appeal from a final board decision, 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 under Appellate Rules. No decision has been made on the merits of this appeal, 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.

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 rehear 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 and Order on a motion for extraordinary review, AWCAC Dec. No. 038, in the matter of *Kuukpik Arctic Catering, LLC., and Alaska Nat'l Ins. Co. v. Lucy M. Harig*; AWCAC Appeal No. 06-040, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *27th* day of April, 2007.

Signed
L. A. Beard, Deputy Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No.06-040 was mailed on *4/27/07* to Harig (certified) and Hennemann at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, Hennemann, & AWCB Fbx.

Signed *4/27/07*
L. Beard, Deputy Clerk Date