Alaska Workers' Compensation Appeals Commission

Voorhees Concrete Cutting, and Alaska National Insurance Co.,
Appellants,

vs.

Kenneth Monzulla,
Appellee.

Final Decision and Order
Decision No. 068 February 4, 2008

AWCAC Appeal No. 07-012
AWCB Decision Nos. 07-0060, 07-0018
AWCB Case No. 199922832

Appeal from Alaska Workers' Compensation Board Decision No. 07-0060, issued on March 21, 2007, by the northern panel at Fairbanks, Alaska, William Walters, Designated Chairman, Tom V. Zimmerman, Member for Industry, Jeffrey P. Pruss, Member for Labor, and Interlocutory Decision No. 07-0018, issued on January 31, 2007, by the northern panel at Fairbanks, Alaska, William Walters, Designated Chairman, Jeffrey P. Pruss, Member for Labor, Debra G. Norum, Member for Industry.

Appearances: Richard Wagg, Russell Wagg Gabbert & Budzinski, for appellants Voorhees Concrete Cutting and Alaska National Insurance Co. Kenneth Monzulla, pro se, appellee.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.[1]

By: Kristin Knudsen, Chair.

This appeal by Voorhees Concrete Cutting arises from a board decision awarding Kenneth Monzulla use of a hot tub as medical therapy, a log splitter as a medical device, transportation costs to attend a 2005 board hearing in Fairbanks, additional transportation costs to attend a 2006 hearing in Fairbanks, and denying the employer's request for a change of venue to Anchorage. The commission finds there was substantial evidence in light of the whole record to support the board's decision

[1] We republish this decision to correct a typographical error on page 24.

approving use of a hot tub; therefore, it must affirm the board's decision. The commission finds the board did not make adequate findings to support the award of penalty on the log splitter, and remands for further findings. The commission concludes that the employee is not entitled to transportation costs to the 2005 hearing, at which he did not prevail, and that transportation costs awarded for the 2006 hearing, at which he prevailed, must be necessary and objectively reasonable. Finally, the commission concludes that the board's denial of the motion for change of venue was within its discretion. We AFFIRM the board in part, REVERSE in part, and REMAND to the board for further proceedings.[2]

1. Factual background and board proceedings.

This is a long, bitter workers' compensation case. The record on appeal contains many more records of medical treatment or opinion than we describe here. There were more proceedings, conferences, and correspondence than we describe even briefly. In view of the volume of records, we do not set out all the facts in detail. We summarize only those facts that are necessary to provide some context for this decision on appeal.

Kenneth Monzulla worked as a concrete cutter for Voorhees Concrete Cutting in Fairbanks. He injured his back picking up a bucket of scrap rebar on November 9, 1999. A Magnetic Resonance Imaging (MRI) scan on January 25, 2000, showed a minor leftsided disc bulge at the L5-S1 level of the spine, but no herniation, and early lumbar spondylosis.[3] Although released for part-time work March 31, 2000, he was not able to continue, and on May 11, 2000, his attending physician removed him from work. The employer paid temporary total disability compensation, temporary partial

[2] The commission heard oral argument on this appeal November 6, 2007. Because a board hearing was scheduled for December 7, 2007, in the underlying case, and the board's denial of a change of venue had been appealed, the commission delivered an oral bench order summarizing its decision after deliberation in a hearing on November 9, 2007, the next scheduled hearing day for the same panel. Mr. Monzulla appeared telephonically and Mr. Wagg appeared in person.

[3] Lumbar spondylosis refers to the presence of bony overgrowth (osteophytes) on the margins of the body of a vertebra. It should not be confused with spondylolysis, spondylitis, or spondylolisthesis.

disability compensation and medical benefits. He was assigned to a reemployment benefits provider for evaluation in June 2000.[4] A dispute arose as to whether Monzulla would be able to return to a former occupation as a heavy equipment operator and, later, the amount of permanent partial impairment he had as a result of the 1999 injury.

In November 2000, and in January 2001, the employee filed workers' compensation claims for additional temporary total disability compensation, medical benefits, attorney fees and costs, and a Second Independent Medical Evaluation (SIME). The employer filed an answer and controversion of the claim based on its medical evaluator's report. The board ordered the second independent medical evaluation, and the evaluation, by Marvin Bloom, M.D., took place in May 2001.

Monzulla developed a plan to begin a fishing charter business, which was tentatively approved by one of his physicians. Monzulla and Voorhees entered into a settlement agreement that compromised and released all benefits Monzulla might claim, except future medical benefits for Monzulla's thoracic and lumbar spine, in exchange for $61,800.[5] The settlement provided that

> [T]he employee's entitlement, if any, to future medical benefits under the Alaska Workers' Compensation Act for his lumbar and thoracic spine is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement. It is agreed, however, that employee's right, if any, to future medical benefits for all conditions other than his thoracic and lumbar spine are specifically waived.[6]

The settlement was approved by the board on September 14, 2001.[7]

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[4] R. 1897.

[5] R. 0087. Voorhees paid an additional $175 in legal costs, R. 0085, $2344.29 to Monzulla's former attorney Valerie Therrien, R. 0086, and $2898.67 to satisfy the lien asserted by Monzulla's former attorney, Chancy Croft. R. 0091-92.

[6] R. 0087.

[7] R. 0090.

Monzulla moved from Fairbanks to the Kenai Peninsula, where he lives in the roadside settlement of Clam Gulch, about 25 miles south of Kenai on the Sterling Highway. He began treatment with Lavern Davidhizar, M.D., who prescribed pain medication, including Methadone. He was evaluated by several other physicians, and underwent MRI scans in January 2003 and September 2003. The January scan showed disc bulging and an annular tear at the L5-S1, and disc extrusion at L4-5. The September MRI scan showed a new disc extension at L5-S1.

In 2004, Dr. Davidhizar ordered another MRI scan, which showed a ruptured disc at the L5-S1 level and progression of degeneration at L4-5. Although Monzulla wanted to be evaluated for disc replacement surgery in California, neither his Fairbanks physicians nor Dr. Davidhizar recommended it.[8] Nonetheless, Monzulla filed a claim for permanent total disability compensation, medical benefits for disc replacement surgery, travel costs, and requesting a penalty for a frivolous controversion of his benefits. In a prehearing conference, Monzulla's claims for surgery,[9] transportation costs, and an unfair controversion penalty were set for a hearing in Fairbanks on May 5, 2005. Monzulla drove to the hearing from his home in Kenai and back. He stayed overnight in Anchorage and Fairbanks. He drove 1,100 miles and spent $270.00 for lodging and meals.

The board, after reviewing the medical evidence, determined that the evaluation was not reasonable and necessary medical care. Therefore, the board ordered:

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[8] At the hearing, Dr. Davidhizar evidently clarified that "he still recommends the mechanical decompression therapy, but for the sake of getting additional information, he would refer the employee to Dr. Delamarter [in California] for an evaluation for surgery." *Kenneth L. Monzulla v. Voorhees Concrete Cutting,* Alaska Workers' Comp. Bd. Dec. No. 05-0137, 7 (May 19, 2005).

[9] At the 2005 hearing, Monzulla stated he was only seeking the evaluation by Dr. Delamarter. *Id.* at 7. In the March 1, 2007, hearing, Monzulla stated he had not said "no, I'm not going to have this surgery. No, I have not come to the full conclusion that I am going to have the surgery." Hrg Tr. 261:13-16. He said he had not got "all the information I need yet, and until I have all the information I am satisfied with the information I will not schedule it." Hrg. Tr. 262:2-5.

> The employee's claims for medical benefits for an evaluation with Dr. Delamarter in California for disc replacement surgery, for transportation costs related to that evaluation, and for a finding of frivolous and unfair controversion are denied and dismissed.[10]

The employer had argued that Monzulla's lumbar disc extrusions were not the result of the 1999 injury for which it had agreed to provide medical treatment. Monzulla argued that his back condition had been found to be related to his employment in Dr. Bloom's 2001 report, and that if the employer is allowed to argue that his condition is no longer compensable, the settlement should be set aside. Of this argument, the board said:

> [T]he consistent medical evidence in the record disposes the employee's specific claim, as discussed above, [so] we decline to consider the employer's argument that the employee should be entitled to no medical care for his L4-5 and L5-S1 conditions. For the same reason, we decline to consider the employee's argument that the employer should be estopped from arguing his L4-5 and L5-S1 conditions are not compensable; and we decline to consider his alternate argument that his C&R should be voided, based on the employer's attempt to challenge the compensability of his injury.[11]

Monzulla asked for reconsideration and the board denied reconsideration.[12] Monzulla did not appeal the board's decision.

Monzulla filed a new workers' compensation claim on December 8, 2005. The issues for hearing were limited in a pre-hearing conference to compensability of the back condition, prescriptions for a hot tub, a queen size bed, a log splitter,[13] recliner, and toilet riser, and reimbursement of travel costs to attend the May 5, 2005, hearing.

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[10] *Id.* at 13.

[11] *Id.* at 11.

[12] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 05-0167 (June 16, 2005).

[13] R. 0179. The month of purchase by cash sale of the log splitter was omitted on the copy of the invoice, but the day is "04" and the year "05". The date on the prescription is "12/5/05." This evidence suggests that log splitter was purchased *before* the prescription was issued. The facsimile stamp date is "Dec. 09" but there is

This claim was heard on April 27, 2006. Once again, Monzulla drove to Fairbanks and back for the hearing, a distance of 1,196 miles, and incurred $128 in lodging and meal expenses. In an interlocutory decision, the board decided that the lumbar spine "condition and symptoms are compensable."[14] The board ordered a Second Independent Medical Examination (SIME) by Dr. Bloom or another physician to give an opinion on the reasonableness and necessity of disc replacement surgery, the reasonableness and necessity of the hot tub,[15] toilet riser, gym equipment, log splitter, and recliner as medical care devices. The board retained jurisdiction to decide the remaining claims, including the legal costs, after the SIME report.

The SIME was done by Sanford Lazar, M.D. on August 18, 2006. Dr. Lazar's report stated:

> In my opinion, Mr. Monzulla has found a satisfactory nearby location for the use of a hot tub and purchase is not reasonable and necessary at this time. Hopefully, if surgery is done and Mr. Monzulla is improved, a hot tub will no longer be needed.[16]

In answer to a letter from Voorhees and a letter from Monzulla, Dr. Lazar wrote

> Personally, I do not think it is possible to prescribe specific frequency of hot tub use in controlling low back pain. Basically, the injured individual who is symptomatic due to disk disease, is left to use the hot tub on an as needed basis. In other words, there is no specific therapeutic value of the hot tub to cure or relieve the effects of injury. Rather, the hot tub is a modality usually of more value than simple heat application such as using a heating pad. I have no recommendation for frequency of use and as I say, usually leave it up to the patient's discretion.[17]

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no indication of the fax number to which it was sent on that date. There is no discussion of a log splitter in the November 7, 2005 report of Dr. Davidhizar. R. 1507.

[14] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 06-0128, 18 (May 22, 2006).

[15] R. 0179. The December 5, 2005 prescription is on a prescription pad and simply lists "hot tub" with a circled note in different hand-writing, "$6,500-$7,500 Tundra Spa."

[16] R. 1779.

[17] R. 1650.

Before the board issued a final opinion, Voorhees requested a change of venue to Anchorage. Monzulla opposed the change. He argued that he wanted the case to remain in Fairbanks where the staff and board are familiar with his case until the outstanding issues were resolved, then, he would be willing to "talk about" moving venue to Anchorage.[18] At the March 1, 2007 hearing he testified that "You guys are doing a pretty good job there [in Fairbanks] and it gets done quicker by the sounds of it."[19]

In its final decision and order, issued March 21, 2007, the board noted that the employer had renewed its request for a change of venue, and that the employee argued against it. The board characterized Monzulla's testimony on the venue change as "he wanted the venue to remain in Fairbanks where the staff and Board are familiar with his case, and he asserted the venue is working out, as a practical matter."[20]

Applying the presumption of compensability to the items sought as medical benefits, the board found that the employer had presented substantial evidence to overcome the presumption of coverage to the toilet riser, recliner, and queen-sized bed, but not as to the hot tub. The board noted that Dr. Bald

> believed the employee's ongoing symptoms were the result of degenerative processes alone, and not related to his back injury at work. Accordingly he felt no treatment would be related to the work injury. . . . Dr. Bald's opinion offers no useful information concerning the specific modalities claimed. . . . However, we are aware of the opinion, and it does not alter our analysis in this decision.[21]

The board rejected the claim for faxes to the insurer on the grounds that the insurer provided a toll-free number. The claim for mileage payments for trips to Monzulla's mailbox the board also rejected as personal in nature and not directly attributable to medical treatment. However, the board awarded mileage for the trips to his neighbor's house to use the hot tub, ruling that mileage to the hot tub was not governed by 8 AAC

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[18] R. 0296.

[19] Hrg Tr. 293:17-18.

[20] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 07-0060, 12 (March 21, 2007) (W. Walters).

[21] *Id.* at 14, n.95.

45.082(f).[22] Since Monzulla's testimony as to why he went to the hot tub was not rebutted, the board concluded the use was reasonable.[23] The board also awarded Monzulla the mileage claim for travel to Fairbanks for both hearings because Monzulla "ultimately prevailed on the major issues of both hearings."[24] The board awarded interest on the log splitter from "the date of the prescription for the log splitter, January 17, 2006, through the date that the device was provided to him."[25] The board denied the renewed request for a venue change for "the reasons more fully articulated in AWCB Decision No. 07-0018."[26] Without further explanation, it repeated the finding that "Fairbanks will better serve the balanced needs of the parties, witnesses, and the Board, and would provide a speedier remedy."[27] The board finally suggest that the "proliferation of litigation . . . over rather small amounts of money" and "myriad of small disputes over incidental, continuing, . . . travel, and . . .devices" might be amenable to settlement in mediation with a hearing officer, and urged the parties to contact the division's staff.[28]

This appeal followed.

2. Our standard of review.

The commission is directed by the Alaska State Legislature to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[29] The board's determination of the credibility of witnesses that appear before the board is binding upon the commission.[30] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the

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22 *Id.* at 17-18.

23 *Id.*

24 *Id.* at 16.

25 *Id.* at 19.

26 *Id.*

27 *Id.*

28 *Id.* at 20.

29 AS 23.30.128(b).

30 *Id.*

Alaska Workers' Compensation Act.[31] 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 this commission in workers' compensation,[32] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[33]

3. Discussion.

This appeal asks us to examine whether the board had substantial evidence to make particular findings of fact regarding the reasonableness and necessity of the trips to use a hot tub and awarding interest on a log splitter. Because these are related issues, we discuss them first. The award of travel costs for the two trips to Fairbanks for board hearings require us to determine whether the board correctly interpreted the regulations and applied the regulation to the facts properly, but the findings of specific facts (how long the trip was, etc.) were not challenged. We discuss the two trips together. Finally, the challenge to the board's decision to deny a motion for change of venue concerns the board's interpretation of the regulation and the exercise of its discretion. We discuss it last.

a. The use of the hot tub as a medical therapy.

In its decision, the board began its analysis of the claim for hot tub use and mileage associated with going to use a hot tub by noting that the presumption of compensability applies to claims for medical benefits, citing *Municipality of Anchorage v. Carter.*[34] It applied the three-step presumption analysis to the claim.[35]

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[31] *Id*.

[32] *See Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

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

[34] *Kenneth L. Monzulla v. Voorhees Concrete Cutting,* Alaska Workers' Comp. Bd. Dec. No. 07-0060, 13 (March 21, 2007); *Municipality of Anchorage v. Carter,* 818 P.2d 661, 665 (Alaska 1991).

[35] *Bradbury v. Chugach Elec. Ass'n,* 71 P.3d 901, 905-906 (Alaska 2003); *Robinson v. Municipality of Anchorage*, 69 P. 3d 489, 494 (Alaska 2003). First, the employee produces some evidence to establish a preliminary link between the injury

Monzulla began using his neighbor's hot tub. He discussed the relief he obtained from his back pain with Dr. Davidhizar. He obtained a prescription for use of a hot tub, and Dr. Davidhizar, in a January 2006 report stated, "Patient has ha[d] relief from neighbors hot tub. Recommend daily hot tub use." The board found this was sufficient evidence to raise a presumption that the hot tub use was reasonable and necessary treatment under AS 23.30.095(a).[36]

The board then examined the evidence, standing alone, that would overcome the presumption. The board considered Dr. Lazar's opinion that other items claimed (a recliner, a "Sleep Number bed" and a toilet riser) are not necessary or reasonable to care for the work injury. The board found Dr. Lazar's opinion was substantial evidence that overcame the presumption as to those items. However, the board found that Dr. Bald's opinion "offers no useful information concerning the specific modalities."[37] The board said of Dr. Lazar's opinion on the hot tub use that he "indicates the use of a

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and the employment. Only evidence that tends to establish the link is considered. Once the link is established, the employee benefits from the presumption of compensability in AS 23.30.120(a)(1). Second, the board decides whether the employer rebutted this presumption with substantial evidence that either (1) provides an alternative explanation which, if accepted, would exclude work related factors as a substantial cause of the injury [or need for treatment]; or (2) directly eliminates any reasonable possibility that employment was a factor in causing the injury [or need for treatment]. Again, the evidence is examined alone. Third, once the employer has rebutted the presumption, the presumption drops out, and the employee must prove the claim by a preponderance of the evidence in order to prevail.

[36] *Kenneth L. Monzulla,* Alaska Workers' Comp. Bd. Dec. No. 07-0060 at 13. Because the treatment was provided more than two years after the injury, the board's inquiry should not have been limited to whether the treatment sought is reasonable and necessary, but should have been expanded, as it had the discretion to choose among reasonably effective medical treatment alternatives, as the process of recovery requires. *Weidner & Assoc. v. Hibdon,* 989 P.2d 727, 731 (Alaska 1999); *Jones v. Frontier Flying Serv., Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 018, 23 (Sept. 7, 2006). However, appellants failed to argue the board's error on appeal. They described that an alternate therapy had been provided, but they did not argue that the rule of *Weidner & Assoc. v. Hibdon* should have been applied by the board and that failure to apply it was prejudicial error. Appellants Opening Br. 11-14.

[37] *Id.* at 14 n.95.

hot tub is reasonable and necessary for controlling the disabling symptoms of the employee's work injury related, persisting low back condition."[38] The board, noting that it found "no substantial evidence in the record to rebut the reasonableness of [the hot tub] for controlling [Monzulla's] symptoms,"[39] concluded that Monzulla was entitled to "the use of a hot tub under AS 23.30.095(a)."[40] Accordingly, in its final decision, the board awarded mileage to Monzulla's neighbor's house.[41]

Voorhees argues strenuously that Dr. Lazar's report was wrongly interpreted by the board because Dr. Lazar specifically stated that the purchase of a hot tub was not reasonable or necessary and that a hot tub had no therapeutic benefit "to cure or relieve the effects of injury." He viewed it as a "modality usually of more value than simple heat application such as a heating pad." He did not recommend any frequency of use. We agree that the inference urged by Voorhees is a reasonable inference.[42] However, that is not the end of our inquiry. We are not permitted to choose between inferences and select the *most* reasonable or compelling.[43] We determine whether the inference drawn by the board from the evidence is permissible and the resulting conclusion is one a reasonable mind could make.

In this case, the inference reflected in the board's decision is also reasonable. Another way of reading Dr. Lazar's report and addenda is that he views a hot tub as a means of pain relief that is "usually of more value than . . . a heating pad," so that *use*

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[38] *Id.* at 14.

[39] *Id.* at 14, n.98, citing *DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000).

[40] Dec. No. 07-0060 at 14-15.

[41] *Id.* at 17-18.

[42] Standing alone, this interpretation of Dr. Lazar's report is sufficient to overcome the presumption that the hot tub use was reasonable and necessary medical treatment as the process of recovery may require. However, as Dr. Bald's report was not sufficient to rebut the presumption, we continue our analysis as though the board had weighed the competing inferences drawn from Dr. Lazar's report.

[43] AS 23.30.122.

as needed of a hot tub is reasonable for pain relief.[44] However, because Monzulla's need for such relief could be obviated by surgery, purchase of a hot tub was not reasonable or necessary. It is also an acceptable inference from Dr. Lazar's report that the degree of additional benefit obtained by use of a hot tub over a heating pad may not be so reasonable if purchase is contemplated. Since the board only awarded use, and not purchase, we find that this appears to be the inference the board drew.[45] We find that a reasonable mind could rely on Dr. Lazar's report and addenda to reach the same conclusion.

We find that the board's decision was supported by substantial evidence in light of the whole record. We need not agree with the inferences the board drew from the evidence to find a reasonable mind could have drawn the inference the board did. Reasonable minds may differ. When the evidence could support differing conclusions by reasonable minds, the board's conclusion is one among those that reasonable minds

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[44] Monzulla was injured before the amendment of AS 23.30.095 by § 35 ch 10 FSSLA 2005, effective November 7, 2005. His claim for a hot tub was not required to be accompanied by a certification by a physician that the palliative care provided by a hot tub was reasonable and necessary to allow Monzulla to continue working, continue to participate a reemployment plan, or to relieve chronic debilitating pain. AS 23.30.095(o).

[45] The board noted that the "reasonable and necessary" standard of AS 23.30.095(a) applied to use of the hot tub. *Kenneth L. Monzulla,* Dec. No. 07-0060 at 13, citing *Weidner & Assoc. v. Hibdon,* 989 P.2d 727, 731 (Alaska 1999). The board's description of the scope of their review is confusing. The board is not limited to deciding if the treatment is reasonable and necessary when, as here, the treatment is proposed more than two years after the injury. It has, as the Supreme Court said, "discretion to authorize 'indicated' medical treatment 'as the process of recovery may require.' Given this discretion, the Board is not limited to reviewing the reasonableness and necessity of the particular treatment, but has some latitude to choose among reasonable alternatives." 989 P.2d 727, 731 (citation omitted). We agree that how reasonable the purchase of a hot tub might be in view of the margin and durability of benefit to the employee compared to other forms of pain relief is something the board may consider in choosing among alternatives. The board may also consider whether it is reasonable to provide a modality by purchase which cannot be maintained by the user (for example, if there is not adequate treated water, electricity, and lawful treatment and disposal of the waste water available) or if the risks associated with its use are outweighed by the margin of benefit obtained by other forms of pain relief.

could reach, and the board applied the correct legal analysis, we must affirm the board's decision.

b. The award of interest on the log splitter.

Voorhees concedes that pre-judgment interest may be awarded when the board determines that compensation is not paid when due, whether or not it is controverted, if the board later awards the compensation.[46] Since the board found the log splitter is in the nature of a medical adaptive device, the payment due date is the same as for other medical devices and interest should accrue in the same manner. Interest accrues from the date the medical bill should have been paid. In this case, the "bill" should have been paid within 30 days after the employer received the bill for a log splitter and a "completed report on form 07-6102."[47] This is the date of presentment; it starts the payment clock running. The appellants argue that there was no evidence to support a finding that payment was delayed because there was no evidence establishing a presentment date.

The board's record is less than satisfactory. It appears that the invoice copy could have been *sent* at the earliest with Monzulla's or the board's service of the claim if it was attached to the claim with a medical summary. At the earliest, the presentment was complete when the information on the invoice was followed by Dr. Davidhizar's

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[46] Appellants Opening Br. 20, citing AS 23.30.155(p). Interest accrues on awards of medical benefits as well as compensation for disability. *Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1191 (Alaska 1993).

[47] 8 AAC 45.082(d). A Form 07-6102 is a Physician's Report Form approved by the board. AS 23.30.095(c) requires physicians to provide medical reports within 14 days of the medical treatment to the employer and the board "preferably on a form prescribed by the board." We agree that Dr. Davidhizar's January 26, 2006, report contains *some* of the information requested in a Form 07-6102 and is sufficient to identify Monzulla, the treatment, diagnosis and recommendation. It does not contain the claim number, the workers' compensation case number, the employer's name and address, the insurer's name and address, a prediction of length of treatment, the next appointment, the date of first treatment, any limitations on the patient's ability to work, predicted length of disability, a statement of medical stability, or the physician's IRS number. However, the report contained far more relevant information than the December 5, 2005, prescription pad note and was, as the board found, sufficiently complete to constitute a "prescription."

January 26, 2006 report; that is, that the employer or its agent had both documents in hand. The board calculated the date that payment should have been made as the date of Monzulla's appointment with Dr. Davidhizar.[48] We find this is error. The report was not written until nine days later; it could not have been presented earlier than it was written. The employer had 30 days after presentment of the report to make payment.

We agree that the board had substantial evidence in the record establishing the date of the invoice[49] and the prescription for the log splitter.[50] Monzulla's testimony that it took the insurer "over a year to pay for this log splitter,"[51] suggests that there was a delay, but there is no evidence in the record to establish the difference between the date of presentment and the date the purchase price was paid to Monzulla. We agree that the board could award prejudgment interest based on the unrebutted testimony of a one-year delay,[52] but it erred in deciding when the interest begins. We direct the board to determine when the adjuster received the January 26, 2006 report and log splitter invoice, and to calculate interest from the latest day payment for the log splitter was due (the 30th day after presentment) to the day Monzulla was paid for the log splitter.

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[48] Dec. No. 07-0060 at 19 ("interest at the statutory rate is due to the employee from the date of the prescription . . . January 17, 2006, through the date the device was provided to him."). January 17, 2006 is the date of Dr. Davidhizer's service – Monzulla's appointment, but the date of the report is January 26, 2006. The report could not have been received by the employer's adjuster before it was even prepared.

[49] We note the invoice establishes that the log splitter was purchased by cash sale on "--/04/05".

[50] The board found that the January 26, 2006 report constituted the prescription, instead of the December 5, 2005 prescription pad note. We find this is a reasonable date to establish the "prescription" because Dr. Davidhizar explained the need for the log splitter in his report, which is not self-evident from the prescription.

[51] Hrg Tr. 246:8-9. Contrary to appellants' argument, Appellants Opening Br. 20, this is affirmative evidence of when the log splitter was "provided." The statement was not refuted by other evidence.

[52] There are no board findings and no clear evidence in the record of when the employer or its agent received Dr. Davidhizar's January 26, 2006 report and the log splitter invoice.

c. The payment of transportation costs to attend board hearings in Fairbanks.

The board relied on AS 23.30.145(b) to award travel costs to Fairbanks for hearings on May 5, 2005 and April 27, 2006.[53] That statute provides:

> If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

The board, without citing the evidence it relied on, found that the "benefits claimed by the employee were resisted by the action of the employer in both hearings."[54] It found that the "employee prevailed on the general compensability of his claim, by far the most significant issue, in the April 27, 2006 hearing. We find the employee initially lost in his claim for disc replacement surgery in the hearing on May 5, 2005."[55] The board then found that "as a result of the SIME report and further development of the medical record . . . the employee has ultimately prevailed on the major issues in both hearings."[56] The board, relying on *Alaska Interstate v. Houston*[57] and *Childs v. Copper*

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53 *Kenneth L. Monzulla,* Dec. No. 07-0060 at 15.

54 *Id*. The board did not make a finding that the employer failed to file a timely controversion.

55 *Id.*

56 *Id.* at 16.

57 586 P.2d 618, 620 (Alaska 1978). Houston was represented by an attorney who assisted him in the successful prosecution of his claim. The question was whether or not Houston's attorney was confined to a fee under AS 23.30.145(b) because no controversion had been filed. The Supreme Court held "Section 145(a) requires only that the Board 'advises that a claim has been controverted,' not that a formal notice of controversy be filed under § 155(d). . . . To require . . . a formal notice of controversion . . . as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose. . . ."

Valley Elec. Ass'n,[58] then stated it was "directed to award costs" by AS 23.30.145(b). In both *Alaska Interstate* and *Childs*, the successful employee was represented by counsel, and the board made findings that counsel's efforts were instrumental in procuring the award. The board made no finding that Monzulla satisfied the second requirement for an award under AS 23.30.145(b): that "the claimant has employed an attorney in the successful prosecution of the claim." Monzulla represented himself. While we agree that both *Alaska Interstate* and *Childs* provide support by analogy for the characterization of the employer's later agreement to provide what the board denied as an "award," those cases do not hold that AS 23.30.145(b) entitles self-represented litigants to an award of "attorney's fees and legal costs." We are not at all certain that AS 23.30.145(b), which requires *two* findings as prerequisite to an award of fees and legal costs, and the Supreme Court cases interpreting it cited by the board, *direct* the board to award Monzulla his costs of travel to the hearings on his claims for the purpose of arguing his case.

However, AS 23.30.001(4) directs that hearings shall be impartial and fair and that all parties shall be afforded due process. We have also held, in another context, that due process requires that a party have the opportunity to face the people who will decide the case against him if the question of the party's credibility is before the

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[58] 860 P.2d 1184 (Alaska 1993). The board, in Dec. No. 07-0060 at 16, n.101, cited to 860 P.2d at 1190, where the Supreme Court began discussing entitlement to an attorney fee under AS 23.30.145(a) notwithstanding the lack of a formal controversion:

> CVEA voluntarily paid benefits for the period from October 1988 through April 1989. CVEA's payment, though voluntary, is the equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing it. *See State, Dep't of Highways v. Brown*, 600 P.2d 9, 12 (Alaska 1979) (holding that where employer apparently thought that resisting the claim any further would lead to a Board decision in the employee's favor, a voluntary payment of benefits constitutes an "award"). Therefore, the Board should have awarded Childs attorney's fees on the amount of the voluntary payment pursuant to AS 23.30.145(a).

860 P.2d at 1190-91.

board.[59] An award of travel costs to a self-represented claimant to attend the hearing at which he or she prevails mitigates the burden of pursuing a right under the workers' compensation act and a sometimes substantial barrier to access to the board. When the board makes sufficient findings to support an award to a self-represented claimant under 8 AAC 45.180(f)[60] and the credibility of the claimant was at issue, the board has authority to order payment of legal costs to the prevailing self-represented claimant

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[59] *Wolford v. Hanson*, Alaska Workers' Comp. App. Comm'n Dec. No. 030 at 13-14 (February 2, 2007), citing *Whitesides v. State, Div. of Motor Vehicles*, 20 P.3d 1130 (Alaska 2001) (when the credibility of a party is at issue, the party has a right to appear in person before the fact finder).

[60] 8 AAC 45.180(f) states in pertinent part:

> The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:
>
> > (1) costs incurred in making a witness available for cross-examination;
> >
> > * * *
> >
> > (5) travel costs incurred by an employee in attending a deposition prompted by a Smallwood objection;
> >
> > (6) costs for telephonic participation in a hearing;
> >
> > * * *
> >
> > (12) reasonable costs incurred in serving subpoenas issued by the board, if the board finds the subpoenas to be necessary;
> >
> > (13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;
> >
> > * * *
>
> (g) Costs incurred in attending depositions not necessitated by a Smallwood objection may be awarded only where the board finds that attendance at the deposition was reasonable.

under 8 AAC 45.180(f) in order to ensure that the claimant's due process rights are not unfairly burdened.

Voorhees argues only that the board failed to make sufficient findings that the travel costs were reasonable and that the board awarded travel costs to Monzulla notwithstanding that he did not prevail at the May 5, 2005, hearing. We find that the board failed to make sufficient findings to support its award of travel costs. We conclude that the board erred in its application of 8 AAC 45.180(f).

8 AAC 45.180(f) requires the board to make a finding of fact that the travel expenses and mileage were "necessary and reasonable costs *relating to the preparation and presentation of the issues on which the applicant prevailed at the hearing* on the claim." There is substantial evidence that Monzulla's attendance at the hearing relates to the preparation and presentation of his claim. There is, however, no evidence that Monzulla prevailed at the hearing on any issues decided by the board. The board found that Monzulla lost his claim for disc surgery in the hearing on May 5, 2005, and that finding is supported by substantial evidence. The board denied and dismissed Monzulla's "claims for medical benefits for an evaluation with Dr. Delamarter in California for disc replacement surgery, for transportation costs related to that evaluation, and for a finding of frivolous and unfair controversion." Monzulla did not appeal the board's decision.

The board found that, because the employer later agreed to pay for the surgery as a result of the SIME and further development of the medical record, Monzulla ultimately prevailed *at the May 5, 2005, hearing*. We disagree. The board denied and dismissed the claim for disc replacement on May 19, 2005. On June 16, 2005, the board denied Monzulla's request for reconsideration.[61]

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[61] The parties returned to obtain a definitive board ruling on a point (compensability of the lumbar spondylosis, herniated or protrubant discs) that logic suggests should have been decided in the May 5, 2005, hearing. However, *the employer* did nothing to bring about the board's omission, and should not have to bear the cost of Monzulla's travel to both hearings, when it clearly prevailed at the first hearing. We view the board's approach as bifurcation of the issues into two hearings. In such cases, if a worker prevails at one hearing, he may not at the next. The

Monzulla filed a new claim in December 2005. He asked again for disc replacement surgery and he also asked that his lumbar spine condition be found compensable. That claim was heard on April 27, 2006. After the board found the employee's back condition was covered by the workers' compensation act, the board ordered the SIME. The SIME was ordered in the April 27, 2006, hearing, not in the May 5, 2005, hearing. Had Monzulla not renewed his request for disc replacement in his December 2005 claim, there would have been no basis for requesting Dr. Lazar's opinion on surgery and the year for modification under AS 23.30.130 would have passed. In short, the "award" is traceable to Monzulla's December 2005 claim, and the proceedings that followed it -- not the May 5, 2005, hearing. The fact that Monzulla sought the same benefit more successfully in another claim does not invalidate the May 19, 2005, decision.

We find that the board's finding that SIME and development of the medical record led Voorhees to agree to the surgery is supported by substantial evidence. However, there is no evidence that the May 5, 2005, hearing resulted in the SIME. Monzulla succeeded in getting the board to order an SIME and to consider disc replacement surgery again by filing a later claim. 8 AAC 45.180(f) requires that Monzulla *prevail at the hearing,* not that he succeed in getting the denied benefits following a later hearing on a later claim. We conclude that the board's finding that Monzulla prevailed at the May 5, 2005, hearing is not supported by substantial evidence. We conclude that the board's decision awarding travel benefits for the May 5, 2005, hearing must be reversed.

Voorhees does not challenge Monzulla's entitlement to an award of travel to the April 2006 hearing. Instead, Voorhees argues that the board's order does not comply with 8 AAC 45.180(f)(13). We agree. First, the board did not make findings that

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employer would not be liable for travel to all subsequent hearings because the employee prevailed at the first. Had Monzulla's hearings occurred in proper order, (compensability first, then specific benefit), *with the same results*, the employer would have been liable for costs of the first hearing, but not the latter. The board's inversion of the logical order of decision does not mean the employee is entitled to all travel costs.

demonstrate it objectively evaluated the "reasonableness" of Monzulla's cost of travel from Clam Gulch to Fairbanks for the April 2006 hearings. The board instead awarded full costs based on Monzulla's *subjective belief* that it was more reasonable to incur time, gas, lodging, food, and vehicle wear and tear, and sit in a car for days than to fly in two short flights from a nearby airport to Fairbanks and back on the same day at about one-half the cost.[62]

Monzulla testified that he spent less out of pocket by driving. Monzulla testified that he spent "a couple hundred dollars" on gasoline.[63] He spent money for food and lodging of $270. Together, this "out of pocket money" exceeded or nearly matched the price of an airplane ticket, established by the evidence at $458.00. Monzulla did not produce evidence of other factors that outweighed the substantial added expense of driving (including mileage and the wear and tear on a personal vehicle), the additional travel time, and the need to buy lodging that made driving objectively more reasonable than flying. He simply argued that he believed it was less expensive *for him* to drive than to buy a single airline ticket[64] and, because the insurer would not buy him a ticket in advance, it was reasonable for him to drive.

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[62] Dec. No. 07-0060 at 16. "We find the employee credible. Whether or not we would have made the same decision in this matter, we find the employee's choice was a reasonable one, considering the facts of the case. Accordingly we will award his reasonable travel costs."

[63] In the week ending April 24, 2006, the average price of midrange gasoline in the West Coast Region (excluding California) was $3.01/gal. United States Dep't of Energy, Energy Information Administration, available online at http://tonto.eia.doe.gov/dnav/pet/hist/mg_mt_5bw.htm. If Monzulla traveled from Clam Gulch to Fairbanks and back, 1190 miles, and spent $200 dollars on gasoline, he was averaging 18 miles/gallon (assuming the price of gasoline remained the same along the Sterling, Seward and Parks Highways between Kenai and Fairbanks), not unlikely gas mileage for a car.

[64] Monzulla refuses to recognize that if he prevails the cost of the ticket to him is nothing because he is reimbursed. Even if driving meant that Monzulla spent "less out of pocket," the evidence demonstrates that the difference was not very much. Unlike driving, Monzulla would not be required to pay all expenses of flying at once, as the airplane ticket would have been purchased well before the need to pay for a taxi

Monzulla testified that "I can't help that these people have to pay for reimbursement for driving. It's out of my control. I didn't set the rules. The rules [are] there for them to follow."[65] Monzulla argued, in other words, that the reasonableness of his conduct should be measured without reference to the cost that his conduct imposes on the employer and the workers' compensation system. We reject this argument.

We are bound by the board's finding that Monzulla was a credible witness in the March 1, 2007, hearing. We do not disturb that finding. Monzulla's testimony about what he spent and his personal beliefs were accepted by the board. However, the board, not the employee, must evaluate and determine the objective necessity and reasonableness of the travel costs. Was it objectively necessary that Monzulla drive to Fairbanks? That is, would a reasonable mind conclude that other more reasonable alternatives were not available, taking into account the party's established physical or mental limitations? Was driving to Fairbanks objectively reasonable? That is, would a reasonable mind conclude it was a prudent and efficient means of travel to the destination, taking into account the traveler's established physical or mental limitations? The board also failed to make a finding regarding the necessity of Monzulla's appearance at the board hearing; appearance will be considered necessary if the credibility of the party's testimony is directly challenged by an opposing party. We remand this portion of the decision for rehearing on the record, and direct that the board objectively determine the reasonableness of the cost of travel claimed by Monzulla and determine necessity for Monzulla's appearance.

4. The denial of the motion for a change of venue.

8 AAC 45.072 provides that hearings will be held in the city nearest the place where the injury occurred and in which a division office is located. The hearing location

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ride to the hearing site; driving, he had to have the money available, if he was paying "out of pocket" instead of by credit card.

[65] Hrg Tr. 238:19-22.

may be changed to a different city in which a division office is located if

> (1) the parties stipulate to the change;
>
> (2) after receiving a party's request in accordance with 8 AAC 45.070(b) (1)(D) and based on the documents filed with the board and the parties' written arguments, the board orders the hearing location changed for the convenience of the parties and the witnesses; the board's panel in the city nearest the place where the injury occurred will decide the request filed under 8 AAC 45.070(b) (1)(D) to change the hearing's location; or
>
> (3) the board or designee, in its discretion and without a party's request, changes the hearing's location for the board's convenience or to assure a speedy remedy.

We agree that the board's decision on Voorhees's motion for change of venue must be upheld. The convenience of the parties may be measured in more than cost; in this case the board considered the probability of delay (both in terms of calendar and in terms of familiarizing another hearing officer with the case) as an inconvenience outweighing the cost to the parties of retaining venue in Fairbanks. When the board first refused to agree to a change of venue, it did not consider Monzulla's decision to drive to Fairbanks at greater expense (to the employer) than flying.[66] The board cannot *require* telephonic attendance if the credibility of a party or party's witness is in issue; this is a factor that should be considered in determining if a venue change would serve the convenience of the parties and witnesses. Nonetheless, the delay in reaching final resolution of this case has had its own cost; the board did not abuse its discretion in denying the motion for a change of venue to avoid further delay. The parties were not *equally* inconvenienced by keeping the venue in Fairbanks, but the regulation does not require that the parties be equally inconvenienced, which is an impractical standard. On the other hand, we caution the board that it may not disproportionately burden one party's access to the board by refusing a change of venue that would benefit both parties' convenience to serve the board's convenience.[67]

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[66] It noted that the parties appeared telephonically to argue the change of venue motion.

[67] Unlike Alaska Rule of Civ. Pro. 3(d), 8 AAC 45.072 does not require a change of venue to one that *best* serves the convenience of the parties and witnesses.

The regulation for change of venue at a party's request does not allow the "board's interest" to be considered. The board is not one of the parties; it exists to serve the public interest. We understand that the impact of moving more cases to a crowded docket presents a difficulty to the board and personnel shortages may result in shifting caseloads. The board has the discretion to move cases in the absence of a request under 8 AAC 45.072(3) for these reasons. However, the board may not relieve a crowded docket by disproportionately imposing costs and inconvenience on one party.

We agree that the board should have mentioned its intent to take official notice of the status of the Anchorage docket at the hearing, but we consider this a harmless error. The Anchorage docket is a matter of public record. On the other hand, Monzulla's reasons for wanting to keep venue in Fairbanks, as he described them in oral argument to the commission[68] and twice in hearing to the board, [69] and the board's acquiescence in his request to retain the venue in Fairbanks over Voorhees' well-founded objections despite considerable inconvenience to Monzulla, may encourage a perception that the board is more friendly to Monzulla in Fairbanks than would be the case in Anchorage. We have no reason to find that is the case in fact.

5. Conclusion and order.

We have concluded that the board had substantial evidence in light of the whole record to support the finding that use of a hot tub was reasonable medical treatment, notwithstanding the contrary inferences that may be drawn from the evidence. We therefore AFFIRM the board's decision to award mileage to use a hot tub. We find that the board did not have substantial evidence to begin the award of interest on purchase of a log splitter on January 16, 2006; we remand for further findings to establish the date the payment was due and recalculate interest. We concluded that the board erred

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[68] Monzulla argued to the commission that the Fairbanks staff knows him and is friendly toward him, understands his problems and always has time to explain things to him.

[69] "[I]ts . . . where the people and board I've been to in Fairbanks twice is familiar with it, and the issues haven't been decided." Hrg Tr. 224:25-225:2. "You guys are doing a pretty good job there [in Fairbanks] and it gets done quicker by the sounds of it." Hrg Tr. 293:17-18.

in finding Monzulla prevailed in the May 5, 2005, hearing; therefore, the award of travel costs to attend the May 5, 2005, hearing is not permitted under 8 AAC 45.180. We REVERSE the board's decision and VACATE the board's award. We concluded the board may award reasonable travel costs to attend the April 26, 2006, hearing. However, the board failed to apply 8 AAC 45.180(f) using an objectively reasonable standard in awarding travel to the April 26, 2006, hearing and by failing to make requisite findings of fact. We VACATE the award and REMAND to the board with instructions to rehear the claim for travel costs on record. We concluded the board's errors in the denial of the petition to change venue are harmless errors, and that the board did not abuse its discretion in denying the motion. We AFFIRM the board's denial of a change of venue. We do not retain jurisdiction.

Date: *4 February 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Jim Robison
Jim Robison, Appeals Commissioner

Philip Ulmer
Philip Ulmer, Appeals Commissioner

Kristin Knudsen
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision that denied a change of venue to the appellants. It reversed and vacated (invalidated) the board's order directing the appellants to pay travel costs for Mr. Monzulla to Fairbanks for the May 2005 hearing; it vacated the award of travel costs from Clam Gulch to Fairbanks for the April 2006 hearing, but it remanded (sent back) the case to the board with instructions to rehear Mr. Monzulla's claim for travel costs, including mileage, for the April 2006 hearing. The board's decision on those travel costs may or may not change on rehearing. Finally, the commission affirmed the board's order for payment of mileage for use of a hot tub. The appeals commission did not retain jurisdiction of the appeal. The appeals commission's decision does not end all administrative proceedings on Mr. Monzulla's claim. It does not affect any other pending claims or petitions in the employee's case at the Workers' Compensation Board. This decision becomes effective when the appeals commission mails or otherwise

distributes it unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted.

If you wish to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed to you. The appeal must 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. To see the date this decision is mailed or otherwise distributed, look at the clerk's Certificate in the box below.

If you wish the commission to reconsider its decision, you must file a written request for reconsideration within 30 days of the date of service (mailing) of the decision. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed or otherwise distributed 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) lists the reasons you may request reconsideration.

If you wish to appeal this decision 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 BY THE APPEALS COMMISSION

A party may ask the appeals commission to reconsider this decision by filing a written motion requesting reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 068, the final decision and order in the matter of *Voorhees Concrete Cutting and Alaska National Insurance Co. v. Kenneth Monzulla*, Appeal No. 07-012, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this __*4th*__ day of ____*February*__, 20__*08*__.

____*L. Beard*_____
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Decision No. 068, the Final Decision and Order in AWCAC Appeal No. 07-012, was mailed on ___*2/4/08*__ to K. Monzulla (certified) & R. Wagg at their addresses of record and faxed to Wagg, Director WCD, AWCB Fbx (Walters) & AWCB Appeals Clerk.

_*L. Beard*_____*2/4/08*_
L. Beard, Appeals Commission Clerk Date