Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and NovaPro Risk Solutions, Movants, vs. Mark McKitrick, Respondent.	Memorandum Decision Decision No. 136 June 30, 2010 AWCAC Appeal No. 10-016 AWCB Decision No. 10-0081 AWCB Case No. 200604112M

Commission Proceedings: Motion for Extraordinary Review filed May 11, 2010; Opposition to Motion for Extraordinary Review filed May 21, 2010.

Appearances: Shelby L. Nuenke-Davison, Law Offices of Davison & Davison, Inc., for Movants, Municipality of Anchorage and NovaPro Risk Solutions; Charles W. Coe for Respondent, Mark McKitrick.

Commissioners: David Richards, Stephen T. Hagedorn, Laurence Keyes.

By: Laurence Keyes, Chair

1. Introduction.

Board proceedings in this matter span more than a decade and involve several board decisions, three of which are relevant to this proceeding: *McKitrick v. MOA,* AWCB Dec. No. 08-0148 (Aug. 21, 2008)(*McKitrick I*); *McKitrick v. MOA,* AWCB Dec. No. 08-0170 (Sept. 19, 2008)(*McKitrick II*); and *McKitrick v. MOA,* AWCB Dec. No. 10-0081, (May 4, 2010)(*McKitrick III*). *McKitrick I and McKitrick III* were issued by the board as Interlocutory Decision and Orders (ID&Os). *McKitrick II* was the board's decision on reconsideration of *McKitrick I*. This matter comes before the commission on a motion for extraordinary review of *McKitrick III* filed by the Municipality of Anchorage and NovaPro Risk Solutions (MOA). Mark McKitrick (McKitrick) submitted an opposition to the motion. The commission held oral argument on the motion on June 9, 2010. The commission has deliberated and decided the motion. This decision sets forth the commission's reasoning in denying the motion.

2. Underlying Facts and Proceedings.

McKitrick started working for MOA as a bus driver in 1995. *See* Opposition at 3.

He had on-the-job injuries in 1999, 2002, and 2003. *See* Motion at 2. These claims were settled through a Compromise and Release in 2005. *See id.* This matter involves two claims of injury: 1) on March 24, 2006, McKitrick's bus was in an accident in which he injured his neck, back, shoulders, and right arm; and 2) on April 22, 2006, McKitrick was assaulted by a passenger, injuring his neck, back, shoulders, face, and hands. *See* Opposition at 3. He maintains that he also suffered post traumatic stress disorder as a result of the assault. *See id.* McKitrick contends he can no longer work as a bus driver. *See id.* at 4.

MOA filed controversions on board-approved forms on August 3, 2006, October 4, 2006, and December 1, 2006, denying all benefits for both the March 24, 2006, accident and the April 22, 2006, assault. *See* Motion at 2 and Opposition at 4. In May 2007, the parties requested a SIME. *See* Motion at 2. McKitrick has been represented by counsel on his claims since May 15, 2007. *See* Motion at 2 and Opposition at 4.

At a prehearing conference held on June 7, 2007, the parties stipulated to a SIME by Dr. Wandal Winn, a local psychiatrist. *See* Motion at 2. Both MOA and McKitrick agree that there were significant irregularities in the arrangements for the SIME by the board's designee, among them, failure to notify the employer of the SIME, failure to provide relevant medical records to Dr. Winn, and failure to provide Dr. Winn with the parties' SIME questions.[1] *See* Motion at 3-4 and Opposition at 2, 4-5. The SIME took place on December 3, 2007. *See* Motion at 3.

Another prehearing conference was held on December 5, 2007, at which MOA objected to the SIME. *See id.* On April 8, 2008, MOA filed a petition which detailed its objections to the arrangements for the SIME by the board's designee. *See id.* at 4. MOA received Dr. Winn's report for the December 3, 2007, SIME on July 10, 2008. *See id.* at 5. A hearing took place on July 23, 2008, which addressed MOA's objections to the SIME and the arrangements for it. *See id.* On August 21, 2008, the board issued *McKitrick I*, which found that Dr. Winn's SIME report should be stricken from the record,

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[1] The board ultimately concurred. *See McKitrick III* at 27.

that he can no longer be impartial, and that he should not perform any more SIMEs. *See McKitrick I* at 6.

On August 28, 2008, MOA petitioned for reconsideration. *See* Motion at 5. The board was asked to reconsider its ruling on the propriety of the SIME arrangements by the board's designee. *See id.* While that petition was pending, on September 5, 2008, Dr. Winn provided another SIME report. *See id.* at 6. Subsequently, the board issued a Decision and Order on Reconsideration. *See McKitrick II*. The board concluded that Dr. Winn's September 5, 2008, SIME report was new evidence that may reflect a change in conditions since *McKitrick I* was decided. *See McKitrick II* at 4. Utilizing the occasion of MOA's petition for a different procedural purpose, the board "granted" the petition, even though the petition raised a different issue. *See id.* at 4. The board ordered a prehearing in order to set a new hearing date, citing AS 23.30.130(a) and 8 AAC 45.150 as authority for the board to review its compensation order, that is, the board's decision in *McKitrick I*, on its own initiative.[2] *See id.* at 3-5.

It was evident that Dr. Winn's September 5, 2008, SIME report had been faxed to the board and to Joan Wilkerson, Assistant Attorney General for Labor & State Affairs, who was involved with McKitrick's public employee retirement claim. *See* Motion at 6. MOA's counsel contacted Wilkerson and was informed that the State had

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[2] AS 23.30.130(a) reads:

> Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.109, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

Whether the decision in *McKitrick I* is a "compensation order" within the contemplation of AS 23.30.130(a) is an issue that is not before the commission.

decided to retain Dr. Winn as its expert after reviewing Dr. Winn's first report from the December 3, 2007, SIME. *See id.* Citing numerous problems with Dr. Winn's September 5, 2008, SIME report, on September 24, 2008, MOA filed an objection to the board relying on this report. *See id.* Thereafter, neither party requested a prehearing conference, as the board ordered in *McKitrick II*. *See id.* at 7. On December 30, 2008, MOA petitioned to dismiss McKitrick's claims, pursuant to the provisions of AS 23.30.110(c). *See id.* The petitions were not answered until April 10, 2009. *See id.* A prehearing conference was held on February 25, 2009; a hearing date was set for September 8, 2009. *See id.*

MOA attempted to depose Dr. Winn beginning in late 2008 and was finally able to do so, pursuant to a subpoena, on May 14, 2009. *See id.* at 7. At his deposition, Dr. Winn acknowledged that his file was missing various documents, including records, notes, emails, and correspondence. *See id.* at 8. On his promise to provide his entire file, including the missing documents, Dr. Winn's deposition went forward. *See id.* Dr. Winn never produced any portion of his file. *See id.* Wilkerson, the Assistant Attorney General, had subsequently asserted that certain communications between Dr. Winn, herself, and others, were attorney work product that should not be disclosed. *See id.* Apparently, Dr. Winn inferred that all of the missing documents he had promised to provide at his deposition could be classified as attorney work product and were not to be disclosed.

The September 8, 2009, hearing was rescheduled to March 10, 2010. *See id.* The board issued *McKitrick III* in which it 1) denied the petition to dismiss McKitrick's claims; 2) ruled that the board's designee abused her discretion in several respects when arranging the SIME; and 3) disqualified Dr. Winn as the board's SIME physician, yet allowed his report to remain as part of the administrative record, as a medical record. *See McKitrick III* at 27.

MOA filed its motion seeking extraordinary review of the board's rulings in *McKitrick III* on three issues: 1) whether the board erred in holding that AS 23.30.110(c) did not bar McKitrick's claims; 2) whether the board erred in declining to strike or exclude Dr. Winn's SIME reports and deposition from the administrative

record; and 3) whether the board erred in deciding that Dr. Winn's SIME reports and deposition could remain in the administrative record as a medical record. *See* Motion at 8-9. For a number of reasons, MOA contended that these three issues, the first issue in particular, warranted such review. In opposition, among other things, McKitrick argued that extraordinary review of these issues was inappropriate. He maintained that "[t]he normal rule requires the Commission not to hear interlocutory appeals but to wait for a final decision of the Board before hearing an appeal." Opposition at 1.

At oral argument, the commission raised the issue whether it had subject matter jurisdiction to hear motions for extraordinary review, in that such motions entail review of board decisions and orders that are not final. The parties responded with arguments for and against the commission exercising such jurisdiction.

The ensuing decision explains that the commission panel members unanimously agree to the denial of the motion for extraordinary review. However, denial is based on this panel's conclusion that the legislature did not provide for commission jurisdiction to hear interlocutory appeals.

3. Discussion.

a. In order to hear interlocutory appeals, the commission must have express or implied authority to exercise that subject matter jurisdiction.

The commission is a "quasi-judicial agency" that was created and is controlled by statutes duly enacted for those purposes by the Alaska legislature in 2005. *See Alaska Public Interest Research Group v. State,* 167 P.3d 27, 34-38 (Alaska 2007)(*AKPIRG*).[3] Whether the commission can act in any particular respect is therefore necessarily dependent on it having statutory authority to do so. *See Barrington v. Alaska Communications Systems Group, Inc.,* 198 P.3d 1122, 1127 (Alaska 2009). In *Barrington*, the commission asserted that it was a party to the appeal of a commission decision to the Alaska Supreme Court. *See Barrington* at 1126. In its opinion, the supreme court noted that "[t]he legislature . . . said nothing authorizing the appeals commission to be a party on appeal to this court, or implying that the appeals

[3] The statutes are AS 23.30.007, .008, .009, .125, .127, .128, and .129.

commission may participate as a party in appeals taken from its own decisions." *Id.* at 1127. From this observation, it follows that the commission had to have express or implied authority from the legislature in order to participate as a party to an appeal to the supreme court of one of its decisions. The supreme court held it did not: "[T]he appeals commission is not a party to appeals from its decisions to this court." *Id.*

Analogously, absent express or implied statutory authority from the legislature, the commission cannot exercise subject matter jurisdiction to hear interlocutory appeals of board decisions and orders that are not final.

> Subject matter jurisdiction is "the legal authority of a court to hear and decide a particular type of case." The doctrine of subject matter jurisdiction applies to judicial and quasi-judicial bodies to ensure that they do not overreach their adjudicative powers. Subject matter jurisdiction is a prerequisite to a court's ability to decide a case[.] *Northwest Medical Imaging, Inc. v. State, Dep't of Revenue,* 151 P.3d 434, 438 (Alaska 2006)(footnotes omitted).

The issue whether a judicial body has subject matter jurisdiction, if not raised by a party, *must* be raised by the judicial body, if noticed. *See, e.g., Hydaburg Coop. Ass'n v. Hydaburg Fisheries,* 925 P.2d 246, 248 (Alaska 1996); *Burrell v. Burrell,* 696 P.2d 157, 162 (Alaska 1984). Here, even though McKitrick did not argue that the commission does not have subject matter jurisdiction to hear interlocutory appeals, under the foregoing authority the commission is obligated to consider that issue, having noticed it of its own accord.

b. The commission does not have express authority to hear interlocutory appeals.

In *Eagle Hardware & Garden v. Ammi,* Alaska Workers' Comp. App. Comm'n Dec. No. 003 (Feb. 21, 2006) (*Ammi*), the commission was called on to decide whether it had subject matter jurisdiction to hear interlocutory appeals. *See Ammi* at 4-9. According to the *Ammi* panel, resolving this issue required the commission to engage in the interpretation of statutes governing its jurisdiction and explained:

> The purpose of statutory construction is "to give effect to the intent of the legislature, with due regard for the meaning that the statutory language conveys to others." Statutory construction begins with the language of the statute construed in light of the purpose of its enactment. If the

> statute is unambiguous and expresses the legislature's intent, statutes will not be modified or extended by judicial construction. If we find a statute ambiguous, we apply a sliding scale of interpretation, where "the plainer the language, the more convincing contrary legislative history must be." *Ammi* at 4, n.8 citing *Tesoro Petroleum Corp. v. State,* 42 P.3d 531, 537 (Alaska 2002)(footnotes omitted).

The *Ammi* panel identified two arguments by the appellants in favor of express statutory authority for the commission to hear interlocutory appeals: 1) the language in certain statutes, AS 23.30.007(a),[4] .008(a),[5] and .125(b),[6] reflects the legislature's intent that the commission exercise such jurisdiction; and 2) an interpretation of AS 23.30, the Alaska Workers' Compensation Act, that would deprive the commission of subject matter jurisdiction to hear interlocutory appeals, such that the superior court would have that jurisdiction, is contrary to that legislative intent. *See Ammi* at 4.

In connection with its analysis and interpretation of subsections .007(a), .008(a), and .125(b), the *Ammi* panel rejected the argument that their language manifested legislative intent to confer subject matter jurisdiction on the commission to hear interlocutory appeals. *See id.* at 5-6. Specifically, the language in .007(a) that the

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[4] AS 23.30.007(a) states in relevant part: "The commission has jurisdiction to hear appeals from final decisions and orders of the board under this chapter. Jurisdiction of the commission is limited to administrative appeals under this chapter."

[5] AS 23.30.008(a) reads:

> The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. The commission does not have jurisdiction in any case that does not arise under this chapter or in any criminal case. On any matter taken to the commission, the decision of the commission is final and conclusive, unless appealed to the Alaska Supreme Court, and shall stand in lieu of the order of the board from which the appeal was taken. Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.

[6] AS 23.30.125(b) reads: "Notwithstanding other provisions of law, a decision or order of the board is subject to review by the commission as provided in this chapter."

"[j]urisdiction of the commission is limited to administrative appeals under [AS 23.30]" was found to expressly limit the commission's jurisdiction, not enlarge it to include interlocutory appeals. *See id.* at 5.

> [This language] expressly limits jurisdiction. The argument that it should be read to include non-final decisions and orders as within our jurisdiction is inconsistent with the general rule of statutory construction *expressio unius est exclusion alterius*, according to which a statute that expresses a particular mode of proceeding should be construed to exclude alternative modes. It would be more consistent with that general rule (and the word "limited") to read [this language] as limiting the jurisdictional grant in the immediately preceding sentence, rather than expanding it. *Id*. at 5 (footnote omitted)(emphasis in original).

Similarly, the *Ammi* appellants contended that certain language in subsection .008(a), that the commission has "authority for the hearing and determination of all questions of law and fact arising under [AS 23.30] in those matters that have been appealed to the commission[,]" provided an even more compelling basis for the conclusion that the commission can hear interlocutory appeals. *See id.* at 5-6. The *Ammi* panel disagreed:

> AS 23.30.008(a) applies only to "those matters that have been appealed to the commission." Thus it presupposes an appeal within our jurisdiction, for unless an appeal is within our jurisdiction, we cannot act on it at all. AS 23.30.008(a) does not provide us authority to determine an issue of law or fact relating to AS 23.30 that is raised in a case outside of our jurisdiction. AS 23.30.008(a) expresses the nature of our subject matter jurisdiction; it does not provide us with jurisdiction over particular cases. *Ammi* at 6.

It was also argued in *Ammi* that AS 23.30.125(b) "modifies the language in AS 23.30.007(a) providing for appeals from final decisions and orders[,]" *id.,* thus allowing the commission to hear interlocutory appeals. The *Ammi* panel was not persuaded, reasoning:

> AS 23.30.125(b) expressly states that the commission may review a decision or order "as provided in this chapter," that is, as provided in AS 23.30. AS 23.30.125(b) is not an independent grant of jurisdiction and does not specify any particular mode of review. It subordinates "other provisions of law" (provisions not within AS 23.30) to "this chapter" (provisions within AS 23.30). Thus, AS 23.30.125(b) provides that whether a particular case is "subject to review by the commission" is

> determined by reference to AS 23.30, not by any "other provisions of law." Because AS 23.30.125(b) does not subordinate AS 23.30.007(a) to any other provision within AS 23.30, it sheds no light on the scope of the jurisdiction provided in AS 23.30.0007(a). *Ammi* at 6.

As their second argument, the *Ammi* appellants maintained that interpreting AS 23.30 so as to deprive the commission of subject matter jurisdiction to hear interlocutory appeals necessarily confers that jurisdiction on the superior court; the exercise of such jurisdiction by the superior court would be contrary to the legislature's intent to provide for a single, authoritative body to review board decisions and to give precedential effect to that body's decisions. *See id.* at 6-8. The *Ammi* panel rejected this argument:

> Th[e] argument has two flaws. First, as stated, the argument omits consideration of the specific language of the legislation in question, and as the supreme court has stated, statutory construction "begins with the language of the statute." Second, the argument presumes that if interlocutory appeals are not within our jurisdiction, they are within the jurisdiction of the superior court[.]
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> With respect to the first point, nowhere in AS 23.30 is there an express grant of jurisdiction for us to hear appeals from non-final decisions and orders. AS 23.30.008(a) and AS 23.30.125(b) are subject to AS 23.30.007(a) as the underlying grant of jurisdiction, and that statute, on its face, is an express grant of jurisdiction only with respect to final decisions and orders.
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> With respect to the second point, the superior court's jurisdiction to hear interlocutory appeals is an adjunct of its jurisdiction to hear administrative appeals under AS 22.10.020(d). Only if the superior court has appellate jurisdiction in a particular administrative proceeding does it have authority to consider, by petition for review, an interlocutory order in that proceeding. AS 23.30.007(a), in conjunction with AS 23.30.008(a), divests the superior court of appellate jurisdiction over proceedings before the board[.] *Id.* at 7 (footnotes omitted).

Based on the foregoing analysis, the *Ammi* panel concluded that, as a matter of statutory construction, there is no express authority for the commission to hear interlocutory appeals. *See id.* at 5-8. The *Ammi* opinion also references another commission panel's decision, *Smith v. CSK Auto, Inc.,* Alaska Workers' Comp. App.

Comm'n Dec. No. 002 (Jan. 27, 2006).[7] *See Ammi* at 9. The *Smith* panel came to the opposite conclusion. That panel found that AS 23.30.125(b), when construed with AS 23.30.128(b), provided statutory authority for the "Commission's power to review non-final orders[.]" *Smith* at 7, n.13. In *Smith,* the panel reasoned:

> In our view, the Commission has jurisdiction to hear appeals from "final decisions" "determining" a claim or petition and "orders", final and non-final, ''otherwise acting" on a claim or petition. If the Commission could review only final decisions, the words "hearing ... or otherwise acting on" in AS 23.30.128(b) would be superfluous. This interpretation is consistent with the language of AS 23.30.125(b), providing that "[n]otwithstanding other provisions of law, a decision *or* order of the board is subject to review by the commission." *Smith* at 7, n.13 (italics in original).

On the issue whether the commission has express authority to hear interlocutory appeals, the *Ammi* panel provides the more persuasive reasoning. As discussed below, the *Smith* panel applied problematic interpretations of AS 23.30.007(a), .128(b),[8] and .125(b), in deciding the commission has that authority.

First, subsection .007(a) confers jurisdiction on the commission to hear appeals of "final decisions *and* orders" of the board. The word "final" is not repeated, nor need it be, in order to modify both "decisions" and "orders." In *R.J.M. v. State,* 946 P.2d 855 (Alaska 1997), the supreme court had occasion to interpret the statutory phrase "substantial physical abuse or neglect" in AS 47.10.010(F).[9] It concluded:

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[7] The commission panels in *Ammi* and *Smith* were composed of different panel members. *See* AS 23.30.007.

[8] AS 23.30.128(b) reads:

> The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

[9] AS 47.10.010 was subsequently renumbered.

> As a matter of syntax alone, the trial court's interpretation of subsection (F) seems strained. The key statutory phrase is "substantial physical abuse or neglect." A colorable argument might be made from this phrasing that "substantial" and "physical" both modify "abuse" but that neither modifies "neglect." The phrasing provides no basis, however, for splitting the modifiers-that is, for applying "substantial" to both "abuse" and "neglect," while applying "physical" only to "abuse." *R.J.M.* at 862.

Even though the subsection of the statute at issue in *R.J.M.* contained multiple modifiers, the supreme court's point is, notwithstanding a colorable contrary argument, a modifier applies to the words that follow them, not just some of those words. Accordingly, subsection .007(a) should be interpreted such that the word "final" modifies both "decisions" and "orders."

Second, without any support from the express language in subsections .007(a) and .128(b) to that effect, the *Smith* panel concluded that orders subject to appellate review by the commission can be "final and *non-final*." In its analysis, the panel inserted the word "non-final" when interpreting subsection .007(a). An adjudicative body is not supposed to construe statutes by inserting words in them. "In construing a statute, it is always safer not to add to or subtract from the language of a statute *unless imperatively required to make it a rational statute*." 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:38 (6th ed. 2002)(hereinafter *Sutherland*) citing *Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063 (6th Cir. 1997), *cert. denied* 520 U.S. 1224, 117 S. Ct. 1724, 137 L. Ed. 2d 845 (1997)(emphasis added). Subsection .007(a), interpreted to provide for commission review of final decisions and orders by the board, and subsection .128(b), describing particular aspects of the commission's adjudicative authority, are rational statutes. Adding the word "non-final" to apply to board orders when construing these subsections is not imperatively required.

Third, the Alaska Supreme Court "construes statutes *in pari materia* where two statutes were enacted at the same time, or deal with the same subject matter." *Underwater Constr., Inc. v. Shirley,* 884 P.2d 150, 155 (Alaska 1994) citing*, inter alia,* 2A *Sutherland* § 51:01-.02 (5th ed. 1992). Statutes *in pari materia* are to be construed together. *See* 2B *Sutherland* § 51:02. Subsections .007(a) and .128(b) were enacted by the legislature at the same time, 2005, *and* deal with the same subject matter, the

appeals commission. Subsection .007(a) provides for appeals of "final decisions and orders," while subsection .128(b) describes board adjudicative activity subject to appellate review and the standards for that review.

Purportedly construing subsections .007(a) and .128(b) together, the *Smith* panel groups the words "final decisions" from .007(a) with the word "determining" in .128(b) and groups the word "orders" from .007(a) with the words "otherwise acting on" in .128(b). In addition, the panel reorders the words "hearing, determining, or otherwise acting on" to form the phrase "hearing . . . or otherwise acting on."[10] Pursuant to this restructuring, and the insertion of the word "non-final," the *Smith* panel would have the two subsections read: On appeal from final decisions, the commission may review discretionary actions, findings of fact, and conclusions of law by the board in determining a claim or petition; on appeal from final and non-final orders, the commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing or otherwise acting on a claim or petition.

The *Smith* panel's interpretive technique, as described above, of subjectively grouping and otherwise reordering the words in subsections .007(a) and .128(b), is a questionable one. Its explanation for doing so is to avoid rendering the phrase "hearing . . . or otherwise acting on" in .128(b) superfluous. *See Smith* at 7, n.13.[11] However, the phrase "hearing . . . or otherwise acting on" is not superfluous.

In subsection .128(b), "otherwise acting on" is a general description of board activity *following* more specific descriptions, namely "hearing" and "determining," provided those words are not placed in a different order, as the *Smith* panel did. "Otherwise acting on" is to be construed as referring to things of the same general class as "hearing" and "determining," according to the statutory construction doctrine of *ejusdem generis*. *See Chugach Elec. Ass'n, Inc. v. Calais Company, Inc.*, 410 P.2d 508, 510 (Alaska 1966); 2A *Sutherland* § 47:17 (where general words follow specific words,

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[10] The transposition of words and phrases in a statute in order to interpret it is disfavored. *See* 2A *Sutherland* § 47.35.

[11] A statute is ordinarily interpreted so that no words are superfluous. *See* 2A *Sutherland* § 46:06.

the general words are construed to embrace only objects similar in nature to those enumerated by the preceding specific words). "The doctrine of *ejusdem generis* is an attempt to reconcile an incompatibility between specific and general words so that all words in a statute . . . can be given effect, all parts of a statute can be construed together and no words will be superfluous." 2A *Sutherland* § 47:17 (footnotes omitted)(italics added). In light of this doctrine, the perceived problem the *Smith* panel was trying to remedy in construing subsections .007(a) and .128(b) as it did, that is, eliminating the superfluity of the phrase "hearing . . . otherwise acting on," does not exist.

Fourth, subsections .128(b) and .125(b) are also *in pari materia* and ought to be construed together. In the attempt, the *Smith* panel reasoned: "If the Commission could review only final decisions, the words 'hearing ... or otherwise acting on' in AS 23.30.128(b) would be superfluous. This interpretation is consistent with the language of AS 23.30.125(b)[.]" *Smith* at 7, n.13. Yet no explanation was forthcoming from the panel as to how the language of subsection .125(b), *see* n.6, *supra*, when construed with .128(b), supports the argument for commission authority to hear interlocutory appeals. In contrast, the *Ammi* decision, handed down three weeks after the *Smith* decision, provides a more reasoned interpretation of subsection .125(b).

> AS 23.30.125(b) is not an independent grant of jurisdiction and does not specify any particular mode of review. It subordinates "other provisions of law" (provisions not within AS 23.30) to "this chapter" (provisions within AS 23.30). Thus, AS 23.30.125(b) provides that whether a particular case is "subject to review by the commission" is determined by reference to AS 23.30, not by any "other provisions of law." *Ammi* at 6.

The *Ammi* panel concluded that .125(b) shed no light on the scope of the commission's jurisdiction, *see id.* at 6, and in the process, rejected that part of the *Smith* analysis which bases the commission's authority to hear interlocutory appeals on that subsection. Accordingly, subsection .125(b) provides no underpinning for an expansion of commission subject matter jurisdiction to include hearing interlocutory appeals.

In summary, we agree with the reasoning in *Ammi* that the commission does not have express authority to hear interlocutory appeals. We respectfully disagree with the contrary reasoning in *Smith*.

c. The commission does not have implied authority to hear interlocutory appeals.

In *Ammi*, the panel held that there is *implied* authority for the commission to hear interlocutory appeals. *See id.* at 8. The basis for this holding was that the express grant of jurisdiction in subsection .007(a) to hear appeals of final decisions and orders should be construed as an implied grant of subject matter jurisdiction to review interlocutory decisions and orders. *See id.* We find that this implication is not present, as explained below.

First, the *Ammi* panel asserted that "the supreme court has indicated that when a court has jurisdiction to hear an appeal from a final decision in a civil or criminal case, it may, in its discretion, review interlocutory orders in those cases." *Id.* In a footnote, the panel cited *State v. Browder,* 486 P.2d 925 (Alaska 1971)(*Browder*) and *City and Borough of Juneau v. Thibodeau,* 595 P.2d 626 (Alaska 1979)(*Thibodeau*) as authority for this proposition. *See id.,* n.14. Read closely, the holdings in *Browder* and *Thibodeau* provide legal support for a somewhat different proposition: In a criminal or civil case where the superior court, acting as an intermediate appellate court, remands the matter to an administrative agency or the district court for further proceedings, that is a non-final order which may be reviewed by the supreme court, pursuant to the authority granted it by the legislature in AS 22.05.010. *See Browder* at 930; *Thibodeau* at 629.

In *Browder,* a district court judge held Browder in contempt of court and immediately sentenced him to six months in jail. *See Browder* at 926-27. Browder filed a complaint for a writ of habeas corpus and a notice of appeal of his contempt conviction and sentence with the superior court, which consolidated them. *See id.* at 927. Following a superior court hearing, the matter was remanded to the district court for a jury trial, with Browder having a right to counsel. *See id.* at 929. The State of Alaska petitioned the supreme court for review of the superior court's decision. *See id.*

The supreme court addressed the issue whether it had jurisdiction to hear the petition for review, that is, to hear an interlocutory appeal under the specific facts applicable to Browder. *See id.* Then, as now, AS 22.05.010 delineated the supreme court's jurisdiction and, at the time *Browder* was decided, read in pertinent part: "The supreme court has final appellate jurisdiction in all actions and proceedings. The supreme court may issue injunctions, writs of review, mandamus, certiorari, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction." *Browder* at 929 quoting AS 22.05.010.[12] As for the issue whether it had jurisdiction in *Browder*, the supreme court held:

> The key to the resolution of this [issue] is for the most part to be found in provisions of AS 22.05.010. We think it significant that the legislature in prescribing this court's jurisdiction specifically provided that "The supreme court may issue injunctions, writs or review, mandamus, certiorari, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction." In our view this provision is a clear manifestation of the legislature's intent that the supreme court would be able to exercise its final appellate jurisdiction other than by appeal. *Browder* at 930.

Thibodeau involved the denial of a zoning variance by a municipality. *See Thibodeau* at 627. That decision was appealed to the superior court, which remanded the matter to the municipality with instructions. *See id.* The municipality sought supreme court review of the superior court's decision. *See id.* at 628. The supreme court noted that the superior court's remand would be subject to its discretionary review jurisdiction, *see id.* at 629, and after citing and discussing *Browder*, a criminal case, the court held: "In a similar manner, the exercise of discretionary review in civil cases such as the one presently before us will insure that this court has the opportunity

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[12] AS 22.05.010 has been added to, restructured, and reworded since *Browder* was decided. It currently reads, in relevant part:

> **Sec. 22.05.010. Jurisdiction.** (a) The supreme court has final appellate jurisdiction in all actions and proceedings.
>
> . . .
>
> (e) The supreme court may issue injunctions, writs, and all other process necessary to the complete exercise of its jurisdiction.

to exercise final review of questions decided by the superior court in remanding a case whenever it is necessary to provide immediate guidance on a particular matter." *Thibodeau* at 631.

In *Browder* and *Thibodeau*, the supreme court concluded that it could exercise discretionary jurisdiction based on the court's construction of AS 22.05.010. Its authority to issue writs, etc. "necessary or proper to the complete exercise of its jurisdiction" was "*a clear manifestation of the legislature's intent* that the supreme court would be able to exercise its final appellate jurisdiction other than by appeal." *Browder* at 930 quoting AS 22.05.010 (emphasis added). The court did not hold that the language in AS 22.05.010 *implied* that the supreme court had the authority to exercise discretionary review jurisdiction.

Although the language in AS 22.05.010 clearly manifested legislative intent that the supreme court could exercise its appellate jurisdiction other than through an appeal, the same cannot be said for AS 23.30.007(a) and .128(b), in terms of the commission's appellate jurisdiction. As discussed above, those subsections do not expressly provide authority for the commission to hear interlocutory appeals. They do not imply that authority either.

Subsection .007(a) grants the commission authority to hear appeals from final decisions and orders of the board. Standing alone, .007(a) does not imply that the commission can hear appeals from non-final decisions and orders, that is, hear interlocutory appeals. Subsection .128(b) sets forth aspects of board adjudicative activity subject to appellate review by the commission. For example, the board's "discretionary actions, findings of fact, and conclusions of law" may be reviewed. This subsection also articulates the standards for appellate review to be applied by the commission. For example, the commission is to exercise "its independent judgment" when reviewing "questions of law and procedure." Nowhere in this language is there an implication that the commission can exercise subject matter jurisdiction to hear interlocutory appeals.

As a second rationale for finding implied authority, the *Ammi* panel observed that the legislature intended to provide for appeals to a body with expertise in workers'

compensation matters, namely, the commission, and to effectively substitute that body for the superior court as the first level of appeals in workers' compensation cases. *See Ammi* at 8. From this premise, the *Ammi* panel concluded that review of interlocutory board decisions and orders by either the superior court or the supreme court would be inconsistent with this intent.[13] *See id.* On the contrary, *if* the legislature intended *any* appellate body to have subject matter jurisdiction to hear interlocutory appeals of board decisions and orders, it is more probable that its intent was to confer such jurisdiction on the supreme court, rather than the commission.[14]

Subsections (a) and (e) of AS 22.05.010 confer jurisdiction on the supreme court to hear both interlocutory and final appeals. Consistent with this legislative mandate, in *AKPIRG, supra*, the court pointed out that it "can have both initial and final jurisdiction to hear administrative appeals[.]" *Id.* at 39. Moreover, Rule of Appellate Procedure 401 states in relevant part: "Part Four of these rules . . . governs requests for appellate review . . . *when appellate review is not otherwise available*." (Emphasis added.) Appellate review of non-final board decisions and orders would not otherwise be available if the commission has no subject matter jurisdiction to hear interlocutory appeals. From this authority it follows that the Alaska legislature intended the supreme court to exercise the jurisdiction it conferred on that court and the court has reserved for itself by rule, to include subject matter jurisdiction to hear interlocutory appeals of board decisions and orders. While the commission may have expertise in workers' compensation matters, the supreme court is the court of "last resort" in Alaska. As

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[13] However, the *Ammi* panel also observed that "[i]f the supreme court has jurisdiction [to hear interlocutory appeals in workers' compensation cases], there is no risk of inconsistent or non-precedential decisions in appeals of interlocutory orders." *Ammi* at 7-8.

[14] We agree with the *Ammi* panel's interpretation that subsections .007(a) and .008(a) divest the superior court of any appellate jurisdiction over the board. *See Ammi* at 7.

such, it has the requisite expertise to hear interlocutory appeals of board decisions and orders.[15]

The *Ammi* panel also relied on some legislative history in its effort to ascertain the intent of the legislature. *See Ammi* at 8, n.15.[16] As previously noted, the panel attached importance to the legislative objective of establishing an appellate body knowledgeable in workers' compensation matters to take the place of the superior court. The conclusion drawn was that the commission must have subject matter jurisdiction to hear interlocutory appeals because the superior court did. The *Ammi* panel's reliance on legislative history for this proposition is misplaced, for two reasons.

Like the supreme court, the superior court has express authority to hear interlocutory appeals. AS 22.05.010 provides a clear manifestation of the legislature's intent that the supreme court hear interlocutory appeals, according to the analyses in *Browder* and *Thibodeau, supra*. *See Browder* at 930. AS 22.10.020(c), which is similar in wording to AS 22.05.010(e), provides express authority for the superior court to hear interlocutory appeals: "The superior court and its judges may issue injunctions, writs of review, mandamus, prohibition, habeas corpus, and all other writs necessary or proper to the complete exercise of its jurisdiction." There is no comparable statutory grant of authority to the commission. Had the legislature intended the commission to have

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[15] The argument could be made that interlocutory appeals of board decisions and orders, no matter which appellate body might have jurisdiction to hear them, the supreme court or the commission, are contrary to one of the purposes of the Alaska Workers' Compensation Act, providing "*quick, efficient,* fair, and predictable delivery of indemnity and medical benefits to injured workers[.]" AS 23.30.001(1) (emphasis added). The supreme court also acknowledged this goal, noting that the 2005 amendments to the act were intended, among other things, to decrease the costs and speed the processing of workers' compensation claims. *See AKPIRG, supra*, at 39. Given this judicially-noted legislative objective, we conclude that the legislature is the appropriate entity to make policy and procedural decisions concerning the exercise of subject matter jurisdiction to hear interlocutory appeals of board decisions and orders.

[16] Consideration of legislative history as a means of construing statutes is an accepted practice in American courts, *see generally* 2A *Sutherland* § 48:02, and in Alaska courts, if a statute is found to be ambiguous. *See Ammi* at 4, n.8 citing *Tesoro* at 537.

subject matter jurisdiction to hear interlocutory appeals, it could have explicitly said so, as it did with respect to the supreme court and the superior court. At the very least, deriving *implied* authority for the commission to exercise that jurisdiction because its predecessor, the superior court, had *express* authority, is unwarranted.

Also, the supreme court instructs that the legislative history of a statute is to be considered only when construing an ambiguous statute. *See Tesoro* at 537. It remains to be seen whether AS 23.30.007(a) and .128(b), when construed together, are ambiguous in terms of the commission's subject matter jurisdiction to hear interlocutory appeals. Nevertheless, assuming subsections .007(a) and .128(b) are ambiguous, we are to apply a sliding scale of interpretation; the plainer the language of the statutes, the more convincing contrary legislative history must be. *See Tesoro* at 537. Our review of that history reflects that the primary concerns of the legislature were the length of time it was taking for appeals to be decided by, and the inconsistency of the decisions emanating from, the superior court. *See* Minutes of Senate Labor and Commerce Committee, March 8, 2005. The commission is not aware of any legislative history that is contrary to a construction of subsections .007(a) and .128(b) as providing for appeals to the commission of final decisions and final orders of the board.

The third reason discussed in the *Ammi* decision as support for the conclusion that the commission has implied authority to hear interlocutory appeals was the panel's interpretation of AS 23.30.128(b). *See Ammi* at 9. The *Ammi* panel asserted that the language in subsection .128(b) "confirms our authority to review interlocutory orders *in the context of an appeal from a final decision or order* under AS 23.[3]0.007(a)." *Ammi* at 9 (italics added). The suggestion is that if the commission's authority were limited to hearing appeals of final decisions and orders, it would preclude the commission from ruling on interlocutory decisions by the board in connection with those appeals. Thus, the converse must necessarily apply; the commission has the authority to hear and rule on interlocutory board decisions in interlocutory appeals.

It is problematic to attribute the implications to subsection .128(b) that the *Ammi* panel does. That subsection describes what the commission may review and the standards it is to apply in conducting that review. There is no language in .128(b) from

which to infer that the commission is precluded from ruling on the issues resolved in an interlocutory decision or order, in the context of an appeal of a final decision. In analogous circumstances, on appeal of a final judgment of the superior court, *see* R.A.P. 202(a), the supreme court can rule on the propriety of the superior court's denial of a motion for partial summary judgment, if that denial is preserved as a point on appeal. Nor does the converse apply. The language of .128(b) does not suggest that the commission has the authority to hear interlocutory appeals of interlocutory decisions. The subject matter of .128(b) is not jurisdictional. It provides that the commission may review the board's discretionary actions, etc., while the board is in the process of hearing, determining, or otherwise acting on a compensation claim or petition and the standards for that review.

Summarizing, we respectfully disagree with the reasoning in *Ammi* that the commission has implied authority to hear interlocutory appeals. The foregoing discussion sets forth our reasons for doing so.

d. The commission is not persuaded that it has express or implied authority to review interlocutory decisions and orders of the board.

At oral argument, MOA contended that the commission has both express and implied statutory authority to hear interlocutory appeals. It disagreed with the *Ammi* panel's conclusion that the commission did not have express authority and agreed with that panel's conclusion that the commission did have implied authority to review interlocutory board decisions and orders of the board. For the reasons that follow, the commission does not find MOA's arguments persuasive.

First, MOA argued the language in subsection .007(a), that the "commission has jurisdiction to hear appeals from final decisions and orders of the board[,]" should be read as including jurisdiction to hear appeals of non-final decision and orders. According to MOA, if the legislature intended to limit the commission's jurisdiction to exclude hearing interlocutory appeals, it would have used the word "only" before the phrase "final decisions and orders." This argument has two flaws. Interpreting statutes according to what they do *not* say, as opposed to what they *do* say, would introduce

greater uncertainty to the statutory interpretation process. Moreover, as previously discussed, one principle of statutory construction is that statutes are not to be interpreted by inserting words in them unless it is imperatively required to make them rational. *See* 2A *Sutherland* § 47:38. There is nothing irrational in subsection .007(a) providing for commission jurisdiction to hear appeals from final decisions and orders. Consequently, inserting the word "only" in order to construe subsection .007(a) as limiting the commission's jurisdiction is unnecessary.

Second, MOA argued that AS 23.30.125(b)[17] is jurisdictional, and therefore enlarges the commission's jurisdiction so that it may hear interlocutory appeals, by virtue of the wording of the heading to section .125, "**Administrative review of compensation order.**" However, a heading is not part of a statute and, unless the statute in question is ambiguous, it is not used to interpret a statute. *See* 1A *Sutherland* § 21:4. In addition, the *Ammi* panel's analysis, concluding that subsection .125(b) is not an independent grant of jurisdiction, does not specify any particular mode of review, and sheds no light on the scope of jurisdiction provided by subsection .007(a), *see Ammi* at 6, is well-reasoned and persuasive. From the commission's perspective, subsection .125(b) is not ambiguous, when interpreted as the *Ammi* panel did, thus eliminating any need to resort to the heading of section .125 as an interpretive tool.

Third, MOA submitted that AS 23.30.008(e) provides statutory authority for the commission to hear interlocutory appeals.[18] On the contrary, subsection .008(e) does nothing more than acknowledge that the commission may do those things that are expressly or impliedly authorized by the statutes that govern it.[19] Subsection .008(e)

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[17] *See* n.6, *supra*.

[18] AS 23.30.008(e) states in relevant part: "The commission, in its administrative capacity, may . . . do all things necessary, convenient, or desirable to carry out the powers expressly granted or necessarily implied in this chapter."

[19] Notably, the supreme court's subsequent pronouncement in *Barrington, supra*, that the commission must have express or implied statutory authority in order to act in any given respect, is consistent with this subsection. *See Barrington* at 1127.

should not be read as expanding the commission's subject matter jurisdiction to include review of interlocutory decisions and orders, if, otherwise, there is no statutory authority for the commission to do so.

Fourth, MOA argued that the commission's regulations pertaining to motions for extraordinary review, 8 AAC 57.072, .074, and .076,[20] provide for commission review of interlocutory board decisions and orders of the board. Indeed, they do. However, the commission notes that, pursuant to the provisions of two statutes under the Administrative Procedures Act, AS 44.62.020[21] and AS 44.62.030,[22] its regulations must be consistent with their enabling legislation, otherwise they are not valid or effective. The discussion in Parts 3a, 3b, and 3c of this decision sets forth, at length, the arguments and reasoning for the commission's conclusion that there is neither express nor implied statutory authority for the commission to hear interlocutory appeals. The subject matter of 8 AAC 57.072, .074, and .076 notwithstanding, these regulations are inconsistent with their enabling legislation, AS 23.30.007, .008, .125, .127, and .128. The regulations cannot provide the authority for an administrative agency, in this instance the commission, to do that which it is not statutorily authorized to do.

Finally, MOA refers the commission to a recent decision of the supreme court, *Burke v. Houston NANA, L.L.C., et al.,* 222 P.3d 851 (Alaska 2010). The citation is in aid of its argument that, should the commission decline to follow its regulations pertaining to motions for extraordinary review, it is improperly promulgating regulations

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[20] In the interest of brevity, the texts of these regulations are not set forth in this decision.

[21] AS 44.62.020 states in relevant part: "To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."

[22] AS 44.62.030 reads:

> If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

through adjudication.[23] In *Burke*, the board applied a regulation it had previously adopted through adjudication, despite having subsequently promulgated regulations, through the usual rulemaking procedures, that superseded the previous regulation. *See Burke* at 866. The supreme court held that the board had to have used the rulemaking procedure to validate the regulation it sought to apply. *See id. Burke* is inapposite. In that appeal, the validity of regulations was in dispute. Here, in contrast, the commission is reviewing whether it has statutorily-authorized subject matter jurisdiction to hear interlocutory appeals. The commission acknowledges that this issue is being addressed in the context of an adjudication. Nevertheless, the object of the exercise is to interpret and apply the enabling statutes of the commission, not to promulgate regulations through adjudication. If, in that process, the validity of existing regulations is called into question, it is an unavoidable consequence of deciding the issue before the commission: whether it has subject matter jurisdiction to hear interlocutory appeals.

4. Conclusion.

We recognize that decisions of the commission have the force of legal precedent,[24] for the commission and the board.[25] Nevertheless, we respectfully disagree with the *Ammi* and *Smith* decisions and MOA's arguments to the extent they are inconsistent with our opinion in this matter that the commission does not have

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[23] The implication is that, if the commission were to rule that it has no subject matter jurisdiction to hear interlocutory appeals, the commission is implicitly repealing these regulations. At the same time, the commission is, in effect, promulgating new regulations through adjudication by creating a void in its regulations in terms of hearing interlocutory appeals.

[24] *See* AS 23.30.008(a).

[25] *See AKPIRG, supra,* at 41-45.

either express or implied authority from the Alaska legislature to exercise subject matter jurisdiction over interlocutory appeals. For this reason, we deny MOA's motion for extraordinary review.

Date: *June 30, 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

signed
David Richards, Appeals Commissioner

signed
Stephen T. Hagedorn, Appeals Commissioner

signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a not a final commission decision on an appeal from a final board decision or order. This is a final decision on this motion for extraordinary review. The effect of this decision is to allow the board to proceed toward a hearing on the merits of the employee's workers' compensation claim. The movants may still appeal a final board decision when it is reached on the claim. Denial of a motion for extraordinary review is not a judgment on the merits of the movants' objections to the board's decision.

This decision becomes effective when distributed (mailed) unless proceedings to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). Because this is not a final commission decision on the merits of an appeal from a final board decision, the Supreme Court might 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 claim, but if you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed.

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

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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

I certify that, with the exception of changes made in formatting for publication, correction of grammatical errors (Notice of Correction of Decision, issued July 6, 2010) and typographical errors, this is a full and correct copy of the Memorandum Decision No. 136 in the matter of *Municipality of Anchorage v. McKitrick,* AWCAC Appeal No. 10-016, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 30, 2010.

Date: *July 6, 2010*

Signed

B. Ward, Appeals Commission Clerk