

Alaska Workers' Compensation Appeals Commission

Sourdough Express, Inc., and Alaska
Nat'l Ins. Co.,
Movants,

vs.

Darrell Barron,
Respondent.

Memorandum Decision and Order
Decision No. 028 January 17, 2006

AWCAC Appeal No. 06-036
AWCB Decision No. 06-0304
AWCB Case No. 199802868M

Motion for Extraordinary Review from Alaska Workers' Compensation Board Decision No. 06-0304, issued November 15, 2006 by the northern panel at Fairbanks, Fred G. Brown, Chairman, Chris Johansen, Member for Management, and Damien Thomas, Member for Labor.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, for movants Sourdough Express, Inc., and Alaska National Insurance Co.; Allen Vacura, Stepovich & Vacura Law Office, for respondent Darrell Barron.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

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

By: Jim Robison, Appeals Commissioner.

Sourdough Express has moved the commission for extraordinary review of the board's final decision and order finding that Darrell Barron's disc tear was a latent injury and that its controversion of his 1999 claim was invalid thus absolving Mr. Barron of the obligation to request a hearing on his claim within two years of the controversion.

The commission grants extraordinary review on the ground that immediate review may materially advance the ultimate termination of the litigation and the decision involves important questions of law on which there is substantial ground for difference of opinion.¹

¹ 8 AAC 57.076(a)(2).

Factual background.

The facts described here are drawn from the Board's final decision and order and this summary is provided only to give sufficient context to frame the issues presented to the commission. The commission makes no independent findings of fact.

Darrell Barron worked for Sourdough Express as a mover from January 1991 through April 1998. The work was strenuous and he suffered many minor aches and pains and a number of specific injuries. In April 1998, Mr. Barron quit his job due to back pain. His back problems continued, however, and in late 1998, he sought treatment from an orthopedic surgeon. In April 1999, he underwent an MRI, which revealed mild degenerative changes involving the facets at L5-S1 and a minimal bulge at L4-5. On November 2, 1999, Mr. Barron filed a worker's compensation claim related to an injury incurred on February 18, 1998, while moving a hide-a-bed. Sourdough Express controverted the claim on November 24, 1999, on a number of grounds including that his work for Sourdough was not the legal cause of his disability.

On January 8, 2000, Mr. Barron was examined by Dr. Stephen Marble in an employer-requested independent medical evaluation. Dr. Marble concluded that Mr. Barron had suffered a minor ankle sprain and low back muscle strain, which had resolved by April 1998.

On May 17, 2001, Mr. Barron filed a worker's compensation claim for an injury to his hip and low back that he said had occurred on June 2, 1994. Sourdough Express filed a Petition to Dismiss under AS 23.30.100 for failing to give timely notice of the injury, which the Board granted on December 14, 2001.

Mr. Barron continued to seek treatment for his back pain and in November 2001 another MRI was conducted, revealing a minimal bulge at L4-5. Surgery was not recommended at that time and Mr. Barron's back was not treated again until December of 2003, when a sudden worsening of his condition took him back to the doctor. An MRI conducted on December 23, 2003, showed a left-sided disc protrusion at L4-5, which was slightly progressive compared with the November 2001 MRI.

On March 3, 2004, a lumbar MRI showed left paracentral disc protrusion at L4-5, which was unchanged in appearance since the December 2003 MRI. Mr. Barron

received an epidural steroid injection for pain and consulted an orthopedic surgeon, Dr. David Witham, who suggested fusion at L4-5 and provided Mr. Barron with the names of some Anchorage surgeons.

In September 2004, Mr. Barron visited the emergency room at Fairbanks Memorial Hospital (FMH) and the Chief Andrew Isaac Health Center, which referred him to Dr. Peter Jiang at the FMH Pain Clinic. In February 2005, Mr. Barron underwent a discography and a CT scan. These tests showed degenerative disc disease at L4-5, with broad-based left paracentral/far lateral disc protrusion and a tear in the L4-5 disc. Dr. Jiang provided an affidavit stating his opinion "that Mr. Barron's employment with Sourdough is a substantial factor in his current lumbar condition. The cumulative effects of Mr. Barron's strenuous work and his various work injuries have resulted in trauma to his lumbar spine which has contributed substantially to his degenerative disk disease and L4-L5 disk tear, and resulting debilitating condition."

On November 10, 2004, Mr. Barron filed a worker's compensation claim for injuries to "multiple body parts" occurring between February 1994 and April 1998. Sourdough Express responded by filing a Petition to Dismiss relying on AS 23.30.100, .105 and .110 and the equitable doctrine of laches.

Mr. Barron testified before the Board that he delayed pursuing his claims because he had believed he was healing gradually, as his original treating physician had said he would. He argued that the employer had not been prejudiced by the delay and that in any case, even if his individual claims are dismissed, he is still entitled to benefits for the cumulative injuries resulting from his work, because Dr. Jiang first diagnosed the L4-5 disc tear on February 8, 2005 and only then was he able to formulate an opinion as to the significance of the tear and its relation to his work. Mr. Barron also argued that Sourdough's November 24, 1999 controversion was frivolous because there was insufficient medical evidence in the record to support it.

The board's decision.

The board determined that the notice requirements of AS 23.30.100 had been met by Mr. Barron based on his testimony that he informed his supervisors of his injuries as they occurred and supporting evidence in the record. However, it also held

that under AS 23.30.105(a) Mr. Barron's claims were time-barred unless latent. Finding that Mr. Barron had consistently asserted that he had work-related back problems and that he quit work in 1998 because of back pain, the board concluded that he "had actual or chargeable knowledge of his disabilities associated with his muscle strain, and its relationship to his employment." Since he had failed to file a claim within two years of that awareness, the board held that his claim for time-loss compensation benefits based on the degenerative disc disease and muscle strain should be denied under AS 23.30.105(a). In contrast, the board declined to deny Mr. Barron's claims for medical benefits under AS 23.30.105(a).

The board also declined to dismiss Mr. Barron's claim for disability benefits on the ground that he had failed to request a hearing within two years of Sourdough's November 1999 controversion. The board found that controversion to be invalid because the record did not contain medical evidence to support the controversion when it was made; and held that AS 23.30.110(c) does not require an employee to ask for a hearing within two years of an invalid controversion.

The board finally found that Mr. Barron's disc protrusion and disc tear were latent and not discovered until December 23, 2003 and February 8, 2005, respectively. Based on Dr. Jiang's diagnosis and opinion regarding the work-relatedness of Mr. Barron's condition, the board denied Sourdough's petition to dismiss any claims related to the disc protrusion or the disc tear.

Sourdough Express has now moved the commission for extraordinary review of the Board's decision, specifically its finding that Sourdough's November 1999 controversion was invalid and that the time limits of AS 23.30.110(c) do not apply to an invalid controversion; and its finding that Mr. Barron's disc protrusion and tear were latent conditions.

The standard for granting a motion for extraordinary review.

The criteria we apply in assessing a motion for extraordinary review are laid out in regulation. 8 AAC 57.076 provides that the commission will grant such review only when it finds the strong policy favoring appeals from final orders or decisions is outweighed by one of the following factors: (1) that delaying review will work an

injustice, cause significant expense or undue hardship; (2) that immediate review may materially advance the termination of the litigation and the board's decision involves an important question of law on which there is substantial grounds for difference of opinion, or on which board panels have issued differing opinions; (3) that the board has so far departed from the usual course of proceedings and regulations as to call for the commission's intervention; or (4) the issue is one likely to evade review and an immediate decision from the commission can provide guidance to the board.

In this case, Sourdough Express filed a motion to dismiss on statute of limitations grounds and thus immediate review of the decision may well advance the ultimate termination of the litigation. The commission also believes that the decision involves important questions of law on which there is substantial ground for difference of opinion, making review appropriate at this time. We emphasize, however, that our grant of review does not imply any position on the merits, only that we believe serious questions needing further deliberation have been raised that should not wait for appeal of a final decision.

The question of latency.

The Alaska Supreme Court has held that "an injury is latent so long as the claimant does not know, and in the exercise of reasonable diligence (taking into account his education, intelligence and experience) would not have come to know, the nature of his disability and its relation to his employment."² The court has not, however, considered the question of "how a change in condition may be distinguished from a latent injury."³ Thus, the question of how to distinguish a new injury from a latent injury remains unresolved. May a progressive condition become a new injury? Are the later developments of known progressive conditions "latent" because they occur later? Or are they a change of the underlying progressive condition?

² *W. R. Grasle Co. v. Alaska Workmen's Comp. Board*, 517 P.2d 999, 1002 (Alaska 1974) (citations omitted); *see also, Egemo .v Egemo Construction Co.*, 998 P.2d 434, 441 (Alaska 2000); *Dafermo v. Municipality of Anchorage*, 941 P.2d 114, 119 (Alaska 1997).

³ *Aleck v. Delvo Plastics, Inc.*, 972 P.2d 988, 990 n. 8 (Alaska 1999).

Application of AS 23.30.110(c).

Sourdough also argues that the plain language of AS 23.30.110(c) mandates dismissal of Mr. Barron's claim for medical benefits because he failed to request a hearing within two years.⁴ It further contends that there is no authority for the board's decision to rule that this section does not apply if a controversion was frivolous or made in bad faith. Finally, Sourdough argues that the record does not contain substantial evidence to support the board's finding that the controversion was made in bad faith, because the claim was controverted for a number of reasons including an excessive change in physicians. Sourdough contends that the record contained evidence to support controversion on that basis and thus the board's finding is not supported by substantial evidence.

In response, Mr. Barron points to *Harp v. Arco Alaska, Inc.*,⁵ as authority for the Board's decision arguing that in *Harp* the Alaska Supreme Court held that when the reasons for controversion offered by the employer are not supported by sufficient evidence to warrant a finding for the employer, a controversion is invalid. But *Harp* was interpreting AS 23.30.155(e), which explicitly imposes a penalty on employers who do not make timely compensation payments.⁶ In contrast, AS 23.30.110(c) does not explicitly limit the applicability of the two year time limit to request a hearing to valid controversions. However, in *Bailey v. Texas Instruments, Inc.*,⁷ the Alaska Supreme

⁴ AS 23.30.110(c) provides in relevant part:
...If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

⁵ 831 P.2d 352 (Alaska 1992).

⁶ *Id.* at 357-59.

⁷ 111 P.3d 321 (Alaska 2005).

Court appeared to suggest, in dicta, that an invalid controversion might make AS 23.30.110(c)'s time limit inapplicable.⁸ Thus, this question too remains unresolved.

Conclusion.

The board's findings in its decision are so sparse that we cannot determine the basis for its finding of (1) a newly discovered latent injury and (2) a bad faith controversion that would bar application of AS 23.30.110(c). In permitting the claim to go forward, the board does not make a finding as to the merits of the claim. There may be evidence in the record that supports the board's decision. Closer examination may allow the commission to parse out the board's reasoning.

Therefore, we GRANT the motion for extraordinary review to the extent that we permit the movant to file an appeal on whether the board used the appropriate legal analysis for latent injury or new injury; and application of 110(c). We also permit the appeal on the application of *Harp* reasoning to a controversion under 110(c) in light of the court's dicta in *Bailey v. Texas Instruments*, 111 P.3d 321, 325, n. 10, and whether the board made sufficient findings of fact to support its conclusion.

The movant is ORDERED to file a notice of appeal as permitted above within 14 days of this order. The respondent may file a cross-appeal.

Date: 17 January 2007 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

⁸ *Id.* at 326 n.10. In this footnote, the court considered arguments against the application AS 23.30.110(c) to deny an employee's claim. One of those arguments was that the employer controverted the claim in bad faith. In rejecting that argument, the court merely noted that there was sufficient medical evidence in the record to support the controversion. The court was silent on the issue of whether an invalid controversion would actually render the time limit of AS 23.30.110(c) void.

APPEAL PROCEDURES

This is not a final commission decision on the merits of this appeal from the board's decision and order. However, it is a final decision on whether the movant-appellant is permitted to appeal the board's decision and order to this commission. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

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

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

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

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

RECONSIDERATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision and Order on Motion for Extraordinary Review, AWCAC Dec. No. 028, in the matter of *Sourdough Express, Inc., and Alaska Nat'l Ins. Co. v. Darrell Barron*; AWCAC

Appeal No. 06-036, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 17th day of January, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.06-036 was mailed on 1/17/07 to at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk,

Signed 1/17/07
L. Beard, Deputy Clerk Date