Case: *North Slope Borough vs. Melvin Wood and State of Alaska, Second Injury Fund*, Alaska Workers' Comp. App. Comm'n Dec. No. 048 (July 13, 2007)

Facts: The employee injured his left clavicle and right knee working for the North Slope Borough (Borough) in February 1991. The Borough paid temporary total disability (TTD) in the past and continued to pay permanent total disability (PTD). The Borough applied to the second injury fund (SIF) for reimbursement on December 31, 2002, arguing that the employee's injuries met AS 23.30.205 because he suffered from preexisting arthritis. The Borough claimed it first learned of the "combined effects" of Wood's preexisting arthritis and his industrial injury from Dr. Ticman on December 26, 2002. The SIF and the Board denied the claim for SIF reimbursement, finding that the Borough's notice was untimely because it was not filed within the 100-week time period under AS 23.30.205(f). The SIF claimed that the medical record contained repeated references that should have led the Borough to recognize the possibility that it possessed a claim against the SIF, well before two years prior to its filing on December 31, 2002. The Board agreed, concluding that from the moment the employer knew or should have known of a possible claim, the 100-week filing period began and the Borough's filing was late. The Borough appealed.

Applicable law: AS 23.30.205 provides:

> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer . . . shall in the first instance pay all awards of compensation provided by this chapter, but the employer . . . shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.
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> (f) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier have knowledge of the injury or death.

Injury "does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met." *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 594 (Alaska 1996).

Issues: Does substantial evidence support the board's conclusion that the Borough's claim for SIF reimbursement was untimely? Was the board's legal interpretation of when the filing period begins correct?

Holding / analysis: The commission concluded that "[b]ecause an 'injury' for SIF purposes occurs when the combined effects test is met, the 100 weeks that mark the outside limit for notice must begin *after* the combined effects test is met and after the employer's knowledge of the injury." Dec. No. 048 at 7. Thus, the board needed to decide:

(1) the date when the combined effects test was first met, noting that

> [w]e do not consider that the mere mention of arthritis in a single vertebra of the lumbar spine, *with nothing more*, must, as a matter of law, inform the employer that the combined effects of that lumbar spine arthritis, which had not resulted in disability, and the employee's later, and much more severe, neck and shoulder injury would result in substantially greater disability than the later injury alone would do. *Id.* at 10[;]

and (2) when the employer knew, or reasonably should have known, of the combined effects injury.

When both the "combined effects" test and knowledge elements are satisfied, the 100-week period begins running to provide notice. The commission remanded so that the board could make these two factual findings.

Note: Comm'n Dec. No. 059 (October 12, 2007) addressed a motion for reconsideration. The commission found that 100 weeks prior to December 31, 2002, was January 30, 2001, not December 4, 2000, and corrected the calculation in Dec. No. 048. But the commission otherwise denied the motion for reconsideration.