SIGNIFICANT COMMISSION HOLDINGS IN 2008

1. *Harnish Group, Inc. v. Moore*, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (Dec. 24, 2008). Board may not award a "reasonable fee" to employee's attorney under AS 23.30.145(b) without evidence from the attorney of the work the attorney did, unless the attorney establishes good cause to excuse compliance with 8 AAC 45.180(d).
    a. If good cause is established, the board may look at awards in similar cases contemporaneous with the case on which the fee award is based.
    b. Is a change in billing record-keeping good cause? No. Destruction of billing records is cause to allow the attorney to estimate his time based on his work product, but not good cause to allow him to avoid requirement that there be *some evidence* of the time and hours the attorney spent.
2. *Schouten vs. Alaska Industrial Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094 (Dec. 5, 2008).
    a. The board may not decide questions the parties do not raise without giving the parties notice of the issue and allowing them the opportunity to present evidence and arguments on the issue.
    b. May the board refuse to answer a question the parties raise regarding entitlement to a benefit? If the parties both clearly ask the board to decide a dispute regarding a benefit under the act, the board may not ignore the dispute and avoid making a decision.
    c. The board may not retroactively suspend [past due] benefits upon condition of future behavior.
3. *O'Hara vs. Carr-Gottstein Foods Safeway, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 093 (Dec. 4, 2008). Did *DeYonge* require the board to find increased symptoms preceding surgery is the substantial factor in bringing about the need for the surgery? *DeYonge's* rejection of a distinction between aggravation of symptoms and the aggravation of the underlying condition in the context of an aggravation claim is not dispositive of a claim for medical benefits based on assertion that a specific injury occurred that required surgical treatment.
    a. The board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment; use of the disjunctive "or" means the board must evaluate the claimed benefits separately.
    b. The board is not required to decide an aggravation claim if it is not properly raised and argued.

4. *Ivan Moore vs. State, Workers' Comp. Div.*, Alaska Workers' Comp. App. Comm'n Dec. No. 092 (Nov. 17, 2008).
    a. Pattern of disparity among decisions based on assigned hearing officer is not evidence indicative of improper board bias, but lack of penalty guidelines may lead to a lack of consistency and fairness in assessing penalties.
    b. A penalty that exceeds four times the premium not paid by uninsured employers is "presumptively unreasonable" if assessed for first violations against uninsured employers where no aggravating factors have been found by the board or where minor aggravating factors have been outweighed by mitigating factors.
    c. The board does not have authority to impose a lifetime suspended penalty without a final discharge date.
5. *Parker Drilling Co. vs. Melchor*, Alaska Workers' Comp. App. Comm'n Dec. No. 091 (Oct. 28, 2008).
    a. AS 23.30.220(a)(10) does not provide a maximum permanent total disability compensation rate that may exceed the applicable maximum compensation rate in AS 23.30.175(a).
    b. Allowable recalculation of gross wages based on gross unfairness under rationale of *Peck v. Alaska Aeronautical, Inc*. does not support a retrospective application of increases in maximum compensation rates established in AS 23.30.175(a) to persons injured before they became effective.
    c. Adjustment of gross earnings for a permanent total disability compensation rate requires a detailed inquiry into the employee's lifetime earning capacity, including diminishment during retirement, but permanent total disability compensation continues at a level rate beyond retirement.
6. *Tire Distr. Sys. vs. Chesser,* Alaska Workers' Comp. App. Comm'n Dec. No. 090 (Oct. 10, 2008). Where the board did not find that the claim was based on highly technical medical considerations, medical evidence was not required to attach the presumption of compensability.
7. *Cameron v. TAB Elec., Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 089 (Sept. 23, 2008).
    a. Board may vary its procedures if manifest injustice to a party would result from a strict application of the board's regulations, but improper failure to vary will not be overturned as abuse of discretion in the absence of a showing of prejudice on appeal.
    b. Refusal to admit records not abuse of discretion when evidence demonstrated lack of good faith attempt to comply with the regulations

regarding medical records or due diligence, and proponent did not request the records until less than 20 days before the hearing.

c. Board not required to grant lesser sanction or continuance to proponent of late evidence when proponent had 2 weeks earlier vigorously objected to opposing party's request for continuance and asserted he was ready for hearing.

d. At first step of presumption analysis, board should not weigh the credibility of the evidence; the board must simply decide if the evidence, including employee testimony, would be sufficient to attach the presumption if it were believed. Rejection of testimony as insufficient to attach presumption because not credible required remand.

8. *Alaska R & C Communications vs. State, Workers' Comp. Div.*, Alaska Workers' Comp. App. Comm'n Dec. No. 088 (Sept. 16, 2008).

a. Board abused its discretion in denying the uninsured employer an opportunity for rehearing on modification in order to allow the employer to present his exculpatory or mitigating evidence when board gave no prior notice of kinds of evidence it would consider in assessing penalty, had previously cancelled without warning hearings employer attended, and board based decision in part on employer's credibility.

b. The factors to be considered in assessing a penalty are set out in 4 broad categories: factors to be considered on a sliding scale; factors bearing on culpability; the community interest; and, employer's ability to pay.

c. Penalty order vacated where board did not consider the nature of the business and lacked substantial evidence that the business would survive imposition of a penalty to pay that exceeds its average quarterly payroll and that totals, with the suspended portion, approximately 80% of its annual payroll.

9. *Moore vs. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087 (Aug. 25, 2008).

a. The presumption in a claim for permanent replacement of a joint may be rebutted by medical expert testimony that the need for the joint replacement is not the result of a temporary exacerbation of the pre-existing condition.

b. When the board makes a mistake in the application of the law, or lacks substantial evidence to support a finding of fact, the commission determines if the board's error prejudices the substantial rights of a party before reversing the board's decision. Board mistake is not grounds for reversal if the erroneous finding or conclusion of law is not necessary to the board's decision.

c. Board lacked evidence on which to base a finding of bias in the sense of medical opinion expert testimony being tangential to question before board, or bias in the sense of being influenced by personal preference, dislike or financial interest in the outcome, so board rejection of opinion because it "may be biased" is error.

10. *Hope Community Resources vs. Estate of Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 086 (Aug. 8, 2008). Death of employee moots appeal of board order directing SIME and reemployment benefits as no liability imposed by the board's order survives; public interest exception does not apply.

11. *Interior Fuels v. Hornbeck*, Alaska Workers' Comp. App. Comm'n Dec. No. 085 (July 31, 2008). Adherence to the time limit for filing a motion for extraordinary review and requirement that it be filed before a petition for reconsideration will not produce injustice where the board's legal error (based on misreading Commission's holding in *Univ. of Alaska v. Hogenson*) denying petition to dismiss claims may be readily corrected on appeal and movants were fully prepared to go to hearing on the merits of the claims.

    a. The commission's regulations establishing extraordinary review were designed to avoid interference in the board's fact-finding process and to favor review after the parties have exercised their rights to present and challenge evidence and the board has an opportunity to fully develop the record and weigh the evidence.

12. *Alcan Elec. vs. James,* Alaska Workers' Comp. App. Comm'n Dec. No. 084 (July 18, 2008).

    a. Where pre-hearing conference summary did not provide a basis for her decision to depart from the regulations, but movants agreed to the process outside the regulations, movants did not preserve their objections, and later events provided opportunity for correction of error, the movants failed to establish prejudicial error requiring immediate review.

    b. Factors established to be considered by designated officer in determining if good cause exists to depart from the regulations with regard to setting hearing dates for dispositive petitions:

        i. the complexity of the case as a whole and severability of contested factual or legal disputes;

        ii. the contribution of the parties to fair, orderly and economical resolution of the case;

        iii. if a party has alleged all the elements (presents a prima facie case) of a defense in a petition to dismiss the claim that would, if valid, dispose of entire claim;

        iv. if the parties would be saved considerable time and expense to prepare for hearing, as well as the imposition on witnesses ordered

to appear and testify, if the dispositive petition is successful and the possibility of settlement exists if the dispositive petition is not successful;

v. the board's calendar and whether the possible benefits of hearing the dispositive petition first and separately outweigh the burden to the claimant associated with any delay of the hearing on the merits and the burden to the defendants if presentation of evidence on the merits affects fair consideration of the dispositive petition.

c. Board's decision affirming a prehearing officer's denial of bifurcation contains possible error, but, because the movants did not demonstrate what material evidence would have been provided to the board or officer relevant to the factors favoring bifurcation, failure to consider those factors by officer or the board did not prejudice movants.

d. Board may not consider the likelihood of employee's attorney receiving payment for his services when deciding hearing dates on dispositive motions, or that the hearings ought to be arranged with a view to encouraging the best opportunity for employee's success because his attorney is paid on a contingent fee. Doing so encourages a pre-judgment of which party ought to prevail at hearing.

13. *Velderrain vs. State, Workers' Comp. Div.*, Alaska Workers' Comp. App. Comm'n Dec. No. 083 (July 9, 2008).

a. Stop order against uninsured employer must be in writing to be effective.

b. In assessing penalty for stop order violation, board must have substantial evidence that employer used employee labor for every day penalty is assessed, and not simply count calendar days between order and compliance. Penalty is for violation of order barring use of employee labor, not being an uninsured business.

c. The power to declare statute setting penalty of $1000 per day unconstitutional is reserved to the courts but the commission notes that a penalty of $1000 per day for violation of a state order not to use employee labor is not outside the range of other fines levied for violation of protective administrative stop orders issued by the state, as in occupational safety and health penalties for unsafe working conditions.

14. *Municipality v. Monfore*, Alaska Workers' Comp. App. Comm'n Dec. No. 081 (June 18, 2008).

a. In AS 23.30.095(c), the word "claim" in the first sentence of means "right."

b. Failure to provide notice of treatment acts as a claim-bar; but "notice" means sufficient notice adequate to alert the board and the employer of the general scope of treatment.

c. Notice by the employee, if provided to the employer and the board, and adequate to alert the board and the employer of the general scope of treatment, is sufficient to avoid the claim-bar.

d. Compliance with AS 23.30.095(l) (substantially reenacted as AS 23.30.097(d)) and 8 AAC 45.082, requires a written report from the provider to trigger the employer's obligation to pay the provider.

e. Statutes place the burden of reporting on the treatment provider; board may not assess a penalty based on the employer's failure to "secure" reports and statements from provider.

f. Penalties on late paid medical expenses are owed to the recipient of the payment of the medical expense, not the recipient of the medical benefit.

g. Where medical provider was not a party to the proceeding before the board, and there is no evidence that the employee was authorized to act on its behalf, the board should have required provider, as the real party in interest, to appear before adjudicating provider's interests where provider's conduct is alleged to result in a bar to the claim for payment.

15. *Greens Creek Mining Co. v. Second Inj. Fund*, Alaska Workers' Comp. App. Comm'n Dec. No. 080 (June 9, 2008).

    a. The presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not extend to an employer's request for reimbursement from the Second Injury Fund.

    b. Second Injury Fund liability for reimbursement of compensation under AS 23.30.205 includes compensation paid pursuant to AS 23.30.041(k), but that liability for reimbursement is not triggered until 104 weeks of disability compensation has been paid.

    c. Board may not award attorney fees against the Second Injury Fund under AS 23.30.145.

16. *Olekszyck v. Smyth Moving Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 079 (May 28, 2008). There is no statutory presumption that an appeal is filed on time, so, to establish good cause to excuse late filing, the appellant must produce sufficient evidence to persuade the commission by a preponderance of the evidence that he should be excused from compliance with the statutory time period of 30 days.

17. *Municipality v. Faust*, Alaska Workers' Comp. App. Comm'n Dec. No. 078 (May 22, 2008).

    a. The 2005 amendment to AS 23.30.041(c) establishing mandatory eligibility evaluation on occurrence of 90 consecutive days of disability, is substantive, not merely procedural. The board erred in directing the administrator to apply the amended version of AS 23.30.041(c) retrospectively to employee injured before effective date of amendment

who failed to file a timely request for evaluation under law in effect at the time of injury.

b. Chair may advise commission, but not rule, on matters of law; to do otherwise diminishes the role of the other appeals commissioners. Appeals commission's special authority rests in the knowledge and experience of all members of the commission panel collectively. The collective will and judgment of the commission is expressed in its decisions.

c. Appeals commissioners are obligated by the oath of office to consider and decide all matters assigned to him or her except those in which the commissioner's disqualification is required. Code of Hearing Officer Conduct applies to appeals commissioners in hearing cases.

18. *Seiler vs. F.R.. Bell and Assoc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 077 (May 22,2008). Remote site doctrine does not eliminate requirement that the claimant demonstrate link between employment and an injury.

    a. Employee who conceded "chest pain" was due to pre-existing, non-work related GERD, but who claimed medevac flight was compensable because going to Prudhoe Bay medic (who advised the medevac) was "sanctioned" by the employer, did not establish that flight was a result of an injury as defined in AS 23.30.395(24).

    b. No evidence before board that going to the clinic resulted in "injury."

19. *BP Exploration Alaska, Inc., vs. Stefano,* Alaska Workers' Comp. App. Comm'n Dec. No. 076 (May 6, 2008).

    a. Board may not weigh evidence on the claim merits in a ruling on a discovery petition, because in doing so the board deprives both parties of the opportunity to be afforded elements of fundamental due process: notice of the subject of the hearing, an opportunity to be heard and to call and examine witnesses, and for fair consideration of their arguments and evidence.

    b. Strong possibility of board error demonstrated where board stated that Supreme Court recognized that employer medical evaluators are agents of employers during litigation of a claim in *Frazier v. H.C. Price/CIRI Constr. J.V.*, 794 P. 2d 103 (Alaska 1990).

    c. To obtain extraordinary review, movant must demonstrate more than board error, must show injustice that cannot be corrected on appeal or prejudice to ability to litigate claim or right; otherwise immediate review of the board's order will do more than serve as an advisory opinion.

20. *Shehata v. Salvation Army*, Alaska Workers' Comp. App. Comm'n Dec. No. 075 (Mar. 19, 2008). Commission awarded attorney fees against appellant employee on divided opinion; two commissioners supported award, each on different

grounds: (a) that appeal was vexatious and filed in bad faith as there was no legal support for it and (b) that appellant was not an "injured worker"; one commissioner dissented from decision to award attorney fees on grounds there was insufficient evidence to show appeal was filed in bad faith merely because imprudent or unpersuasive and a strong policy favors access to appeal.

21. *Univ. of Alaska v. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074 (Feb. 28, 2008).

    a. When a claim for benefits expires under AS 23.30.110(c) and is dismissed, a later-filed claim for the same benefits for the same injury will not revive the expired claim, but a later-filed claim for the same benefits *on a different nature of injury previously unknown to the employee*, or *for a different benefit from the same injury*, is not extinguished with the earlier claim.

    b. Board properly permitted the employee's claim for benefits based on the claimant's allegation of physician interference to survive where viability of claim under the Act not an issue before the board in employer's petition to dismiss.

22. *DeNino v. Yukon Flats School Dist.*, Alaska Workers' Comp. App. Comm'n Dec. No. 072, (Feb. 27, 2008). Alaska Rule of Evidence 404, prohibiting the use of character evidence to prove conduct on a particular occasion, does not bar Board admission of evidence that contradicts a party's testimony and thus suggests the party is lying, or that presents relevant evidence of motive or intent, or that contradicts a party's theory of causation.

    a. Physician witnesses must be able to frankly state opinions regarding the cause of the injury or illness and the reasons for that opinion, however uncomfortable to the claimant. If the physician's observations, data, and knowledge of medicine lead her to the conclusion that the claimant's account of how the injury occurred is not likely to be true, the physician's report is not inadmissible evidence of the claimant's bad character. It is expert opinion evidence addressing the issue of causation.

    b. The board is not required to favor lay testimony over medical testimony; board must evaluate lay testimony when the lay evidence may be highly relevant to the issue of causation, even in complex medical cases.

23. *Coalition, Inc., v. State, Workers' Comp. Div.*, Alaska Workers' Comp. App. Comm'n Dec. No. 071 (Feb. 15, 2008).

    a. The only witness against uninsured employer did not give testimony under oath or affirmation; therefore, the board's reliance on his statements as testimony was insufficient to support its findings. Overlooking requirement that witness be sworn is not harmless error.

b. Board failed to determine if uninsured state contractor employer's policy was properly cancelled under AS 23.30.030(5) where there was no evidence of insurer notice to the contracting agency of the state.

c. Mandatory requirement of written notice to contracting agency may not be ignored because the division and employer neglected to address the issue in proceeding to assess penalty for failure to insure without the possibility of imposing liability upon the state and serious sanctions on employer under AS 23.30.045(d); case must reheard.

24. *Martin vs. Nabors Alaska Drilling, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 070 (Feb. 13, 2008). Injury while sitting on motorcycle at stop light on way to relative's home in California did not occur in course of employment notwithstanding employee's claim that, he drove motorcycle to California to find and interview a physician that could successfully treat his back injury, without referral from, or knowledge of, his Alaska attending physician.

    a. Alaska law does not recognize pure positional risk as the basis for liability for workers' compensation; injury must arise out of and in the course of employment.

    b. Settlement from a personal injury, occurring after the work injury that established the employer's liability, may be the basis of an employer claim for reimbursement limited to the employer's payment of compensation and medical expenses directly attributable to the personal injury's aggravation of the work related injury, but, because employer is not liable for injuries caused by personal injury, employer is not entitled to recover amounts under AS 23.30.015(e)(1)(D).

25. *Sourdough Express, Inc. vs. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (Feb. 7, 2008). In the absence of evidence of prejudice to the employer, amendment of employee's claim to conform to newly discovered evidence was within the discretion of the board.

26. *Voorhees Concrete Cutting, Inc. vs. Monzulla*, Alaska Workers' Comp. App. Comm'n Dec. No. 068 (Feb. 4, 2008). An award of travel costs to a self-represented claimant to attend *the hearing* at which he or she prevails may be made when the board makes sufficient findings to support an award to a self-represented claimant under 8 AAC 45.180(f) and the credibility of the claimant was at issue, to ensure that the claimant's due process rights are not unfairly burdened.

    a. 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.

b. 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.

27. *Peratrovich vs. Quality Asphalt Paving*, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (Jan. 24, 2008).

a. The party challenging the board's ruling on a point of evidence must establish that admission, or exclusion, of the evidence might have affected the outcome of the trier of fact's decision.

b. Workers' compensation hearings are not popularity contests; a greater number of physicians on one side, as opposed to the other, does not mean greater weight must be assigned to the majority opinions.

c. *Black v. Universal Services* does not require the board to automatically reject a medical expert opinion merely because it is not the same as other medical opinions; the Supreme Court's rejection of Dr. Pennell's report in *Black* rested as much on the "slender evidentiary support" for it as the singularity of his opinion.

d. The existence of contradictory evidence, even evidence another panel might find more probative, or competing inferences that may be drawn from the evidence, does not allow the commission to overrule the board.

28. *Witbeck v. Superstructures, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 066 (Jan. 23, 2008).

a. 8 AAC 45.082(c)(2) allows the first designation of attending physician to be done by getting treatment, but, whether or not employer consent is required, notice of a change from the first designated attending physician must be given before the change takes effect – that is, when the employee gets "treatment, advice, an opinion, or any type of service . . . for the injury."

b. Notice of change of attending physician must be writing to which, if the change is not the first change, the employer must respond within 14 days to record consent or denial.

c. A workers' compensation hearing officer is not barred from having family members who own or are employed in business; hearing officer is barred from hearing cases in which the family member is a party or the business employing a family member is a party.

d. Ownership or management of a business that also experiences workers' compensation claims, but which is not a party to the matter being heard, does not disqualify an industry member. Membership or holding office in a labor union whose members file workers' compensation claims, but are not a party to the matter being heard, does not disqualify a labor member.