Church v. Arctic Fire & Safety, Alaska Workers' Comp. App. Comm'n Dec. No. 126 (Dec. 31, 2009). Board did not abuse its discretion in limiting SIME to records review where employee had already had surgery, an extensive record existed and medical history was well documented, and board left open possibility of medical examination if SIME physician required it.

Municipality of Anchorage v. Mahe, Alaska Workers' Comp. App. Comm'n Dec. No. 125 (Oct. 27, 2009) (published Dec. 29, 2009). Appellant is not required to provide a translation of its brief in Samoan to appellee. It is generally the responsibility of the receiving party to obtain a translation of a brief filed in the common language of the tribunal. Absent evidence that the appellee is unable to pay for the translation and that a translation at commission or appellant expense is the only way of overcoming a significant barrier to meaningful participation in the appeal, the commission will not impose the cost of translation of appellant's brief on appellant or the public.

State, Dep't of Trans. V. Stowell, Alaska Workers' Comp. App. Comm'n Dec. No. 124 (Oct. 15, 2009) (published Dec. 29, 2009). On motion for stay of board award pending appeal, State of Alaska is not required to post a supersedeas bond. Since 1949, the State has been exempt by statute from the courts' authority to require a bond as a condition of a stay, and commission, with less authority than a court, cannot require what the legislature forbade the courts to require.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp.

App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board's failure to explain why it chose to award attorney fees under AS 23.30.145(b) on benefits controverted but awarded, instead of AS 23.30.145(a), is plain error requiring reversal.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). The board may not ignore the requirement that it make a finding regarding controversion when awarding attorney fees.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board recitation that the services were complex is inadequate to describe the relative complexity of the services provided.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Board failed to state if the attorney fee awarded excluded services for benefits not awarded. Commission does not disapprove the comparison of value of benefits awarded to benefits sought as a means of establishing a percentage basis for calculating fee, but board did not make such a comparison here, where only statement was that the requested fees were "a little too high" for the associated award.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). There is no presumption that the requested fee is reasonable. Attorney seeking fee must demonstrate the requested fee is reasonable.

Lewis-Walunga & Soule v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (Dec. 28, 2009). Litigation of workers' compensation cases should not be treated as wholly exempt from the balancing of expenditure and risk that employee plaintiffs face in other labor and employment law actions. The legislature chose to shield the worker from improvident pursuit of a claim, but not his attorney.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). When lay testimony is material to the crucial issue before the board, the board must indicate in its decision whether it evaluated the testimony and what weight it gave it. On appeal, claimant who asserted board failed to make findings regarding lay testimony must demonstrate that the testimony offered was material to a question the board had to answer in order to decide the claim.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Testimony is material when it has some logical connection with consequential facts, that is, facts that have a legal consequence.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Rule that requires the commission to assume that failure to testify credibly was not a relevant factor in the board's decision does not mean commission must assume the board believed the witness or that the witness's credibility was a relevant factor. Board silence on witness testimony cannot be

interpreted as any judgment on credibility.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). In case of low back strain, where board made no finding of medical complexity, the board's broad experience of low back injuries sufficient to support its decision to disregard dispute between parties on the propriety of employee's termination from employment, focus on medical opinion evidence regarding causation of the strain.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Board properly weighed competing medical evidence and did not require employee to produce evidence in a particular probability formula. Board's comment on the employee's physician's testimony was based on possibilities and inconclusive was a fair comment given physician's descriptions of her opinions.

Rivera v. Wal-Mart Stores, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 29, 2009). Board's decision to give greater weight to some medical evidence over competing evidence is conclusive. The appellant did not dispute that the competing evidence was sufficient to overcome the presumption; therefore, it conceded it was sufficient as a matter of law to permit the board to deny the claim.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). The evidence in support of a controversion is determined as of the time the controversion is mailed. The evidence in support of a controversion is not weighed in determining if it is sufficient to support a valid controversion.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). A physician's retraction of an opinion supporting controversion is not retroactive to the date of the original opinion. Retraction is effective when communicated. Retraction of an opinion does not mean that the controversion lacked evidentiary support when issued; to hold otherwise would mean that the two opinions had been compared and the later opinion given greater weight.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Evidence to support a controversion must be evidence that could rebut a presumption in favor of the claimed benefit if no contrary evidence were introduced, but it need not be evidence that would prevail against contrary evidence when the dispute is heard.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Where no employer medical examination had been done, employer was not required to contact all of employee's physicians for opinion before controversion; only physician employer must contact is the attending physician; however, employer may rely on the only physician employee asked to give an opinion on disability, when employee failed to provide proper designation of attending physician.

Kinley's Restaurant & Bar v. Gurnett,
Alaska Workers' Comp. App. Comm'n
Dec. No. 121 (Nov. 24, 2009). Employee's
direction to employer to address question
of disability to consulting physician
amounted to designation of consultant as
attending physician. Consultant's later
referral of adjuster and employee to
default attending physician (by
regulation) may have been attempt to
communicate unwillingness to serve as
employee's attending physician, but board
failed to make a finding this was so.

Kinley's Restaurant & Bar v. Gurnett, Alaska Workers' Comp. App. Comm'n Dec. No. 121 (Nov. 24, 2009). Employer's written assertion that employee is unable to return to work in the same employment due to work related injury is a position amounting an acceptance of liability for disability compensation which insurer must honor until or unless other evidence is obtained that the employee is able to earn wages in the same or other employment, provided (1) the employee's position is still available and the employment relationship is not terminated (because Act does not give an employee a right to return to same employment by causing vacancy or rehire, but bars discrimination on basis of workers' compensation claim); (2) employer refuses in writing to accept the employee's physician's release to return to work in the employee's position at the time of injury; and (3) employer's refusal is based on the belief that the employee cannot, because of an undisputed work injury, perform the essential functions of the position. This rule does not apply when the employer offers temporary limited duty, alternate positions, or limitations on hours consistent with medical advice or safety rules, even if a

reduction in pay results, or if controversion is supported by other legal grounds.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Ordering the employee to attend, and employer to pay for, a SIME is no substitute for the board's careful review of the record and evidence.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Commission will consider an issue that has not been raised when the issue involves a question of law that is critical to a proper and just decision or the error is manifest on the face of the record. A manifest error occurs when an obvious mistake that should have been noticed is made, similar to the plain error standard applicable to arguments raised for the first time on appeal: an obvious mistake that creates a high likelihood of injustice.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board may not conditionally decide a claim by denying a claim "at this time." A decision that a claim is awarded or denied is a final decision on the claim. The board may not leave a claim in an indeterminate state forever by appending "at this time" or other such language to the order denying the claim.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board failure to review the entire record of claim that dated back to 1993 was obvious mistake, where record transmitted on appeal

consisted of only 230 pages, and medical records were filed no earlier than 2006. The record contained no copy of the compromise and release agreement at issue, no medical reports initially filed and stamped by the board, no compensation reports, no report of injury, and was plainly incomplete. The board did not give notice to the parties that the record was incomplete. Failure to review the record before deciding the record was "not entirely clear" was manifest or plain error that requires board's order be vacated.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board erred in ordering SIME on board record that failed to demonstrate medical dispute, and where board record did not support finding that record was "not entirely clear." Record on which board made its decision instead was clearly not entire record.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). SIME may not be ordered under AS 23.30.110(g) when only medical benefits are claimed because AS 23.30.095(k) is the method for requesting SIME in claim for medical benefits. Board's authority to order SIME is limited to claims for disability compensation payments. Board cannot use AS 23.30.110(g) to circumvent AS 23.30.095(k)'s requirement of a finding of medical dispute.

Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). SIME examinations should not be ordered lightly without evidence of need. Fred Meyer, Inc., v. Updike, Alaska Workers' Comp. App. Comm'n Dec. No. 120 (Oct. 29, 2009). Board finding that evidence is insufficiently clear to decide the case is logically inconsistent with its finding that sufficient evidence was produced to overcome the presumption. If employer's evidence overcame the presumption, it is adequate to support a conclusion in the employer's favor if not outweighed by other evidence. The board's failure to weigh the evidence was plain error.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). The 2-year limit on supplementary reemployment compensation (stipend) in AS 23.30.041(k) applies after vocational reemployment plan acceptance or approval.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Reasonable pre-plan stipend payments should not exceed the period established by the legislature for completing the pre-plan process. Absent certain circumstances, such as an unreasonable impediment by the employer, a board award of retroactive pre-plan stipend up to the period established by the legislature is presumptively reasonable.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). The effect of a reviewing court's reversal that vacates a judgment is to return the case to the posture it was before the judgment was entered. Therefore, remand to the board vacating order denying petition for modification of board order terminating

benefits returned case to point just before denial of modification.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Modification of a prior board order having prospective effect is effective on the date of the new order entered under AS 23.30.130(a), unless the board makes modification retroactive to the date of the request for modification. This rule does not apply to modification orders issued under AS 23.30.130(b) or modification sought as part of a timely request for reconsideration under AS 44.62.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Pre-plan stipend is secondary to the primary reemployment benefit which is monitored assistance in developing a plan for reemployment with aid from qualified specialists. Right to stipend in pre-plan gap after exhaustion of temporary disability compensation and permanent partial impairment compensation is contingent on employee's active pursuit of the reemployment benefits, that is, the monitored assistance in developing a plan for reemployment with aid from qualified specialists.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Eligibility for preplan stipend was established by board order modifying order on petition to terminate reemployment benefits, but eligibility for benefits, including stipend, ceased when employee failed to contact re-employment benefits administrator within 15 days to seek appointment of a plan specialist.

Griffiths v. Andy's Body & Frame, Alaska Workers' Comp. App. Comm'n Dec. No. 119 (Oct. 27, 2009). Appeal of board's denial of past due stipend does not excuse failure to contact administrator to continue eligibility for prospective, continuing benefits. The acceptance of prospective benefits under a board order is not a waiver of the claim for past benefits.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Presumption of compensability and presumption of sufficient notice are distinct, but involve similar analyses.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). No distinction is to be drawn between raising and attaching the presumption.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Credibility determinations are not made in the first two steps of presumption analysis. In cases where only "totally unreliable testimony" supplies the preliminary link, the link would not be established (or would be rebutted by the evidence of unreliability of testimony), but where some corroborating evidence exists, the lack of credibility of the testimony is not sufficient to eliminate attachment of presumption.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Board erred in evaluating credibility determining presumption attached, but error is harmless where board completed alternate analysis as if claimant had given sufficient notice of claim.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Employer's evidence directly contradicts employee's testimony on significant points and, with admission of lack of timely written notice, overcomes a presumption of sufficient notice. Employee was required to prove, by preponderance of the evidence that he gave sufficient notice of injury or that failure to do so was excusable under AS 23.30.100(d).

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Board had sufficient evidence to find lack of timely notice prejudiced employer, a logging company, where testimony established it no longer existed, its employees were gone, and employer records were hard to locate.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Testimony that flatly contradicts employee's account of serious and traumatic injuries at logging camp and the immediate effect they had on his ability to walk and work eliminated a reasonable possibility that he suffered the traumatic injury he claimed.

McGahuey v. Whitestone Logging, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 118 (Oct. 23, 2009). Employer satisfied board's discovery order by producing evidence it had regarding witness; employer was not required to seek out new information regarding witness and board's support staff had no

duty to locate missing witness for the employee, where witness was not an employee of the workers' compensation division.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan.5, 2009) (published Sept. 30, 2009). The board's orders often concern a single dispute rather than final disposition of a case. The Alaska Workers' Compensation Act contains no "closure" statute requiring an insurer to give notice of claim closure and requiring a claimant to object or seek reopening in a certain period. Therefore, in determining the finality of a board decision, the commission does not look to the last possible order the board could make in a case.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan.5, 2009) (published Sept. 30, 2009). Denial of employer's petition on jurisdictional grounds to dismiss state's petition for assessment of a civil penalty was not a final appealable order because it left the parties' rights in the petition for assessment of a civil penalty unresolved.

Stepovich v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 117 (Jan.5, 2009) (published Sept. 30, 2009). In view of board's action labeling its decision a "final decision and order," providing instructions for filing an appeal, the appellant's reliance on the board's description of the order, and the lack of a regulation requiring a finding of "final adjudication" equivalent to a "final judgment" when dispositive petitions are granted or dismissed, the commission

allows the appellant to convert appeal to motion for extraordinary review.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Board does not have authority to order employer to cease payroll deductions of overpaid leave pursuant to collectively bargained agreement because the leave payments are triggered by or coordinated with compensation payments.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Board's power to approve settlements under AS 23.30.012 and thereby convert settlement to a board order, is limited to settlement of claims, or liability, for compensation under AS 23.30. only; parties' rights to settle claims under AS 23.30.012 is limited to claims that arise under AS 23.30.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Party relying on a release of liability in approved settlement agreement must show that the release was given with an understanding of the nature of the release. Where employee claimed general release of "claims of any nature whatsoever" in workers' compensation settlement agreement included employer's claims for repayment of injury leave under collectively bargained agreement, the employee must demonstrate that the employer understood that the release language included the leave dispute.

Reeder v. Municipality of Anchorage, Alaska Workers' Comp. App. Comm'n Dec. No. 116 (Sept. 28, 2009). Workers' compensation agreements, like other contracts, are interpreted to give effect to reasonable expectations of parties to agreement. Employee's testimony that he did not know about the potential claim for leave repayment when the release was signed meant he could not have a reasonable expectation that workers' compensation settlement agreement disposed of employer's claim under collectively bargained agreement for potential injury leave reimbursement.

Reeder v. Municipality of Anchorage,
Alaska Workers' Comp. App. Comm'n
Dec. No. 116 (Sept. 28, 2009). Workers'
compensation settlement waiver of claim
for recalculation of compensation rate or
additional compensation (including
penalty) does not deprive board of
authority to require adjuster to provide
records of the past compensation
payments and the date and amounts paid
so the employee could determine if injury
leave deductions pursuant to collective
bargaining agreement were correctly
calculated.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Commission will uphold board's findings of fact if the board had sufficient evidence in the record to support the findings, even if commission would have found other evidence more persuasive. Board, not commission, is the trier of fact.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Commission will not act because board failed to rely on the largest or most impressive medical evidence or most knowledgeable physician; but, commission will act if the evidence board chose to rely on was not substantial, i.e., not evidence a reasonable mind could rely on to reach a conclusion.

Winkelman vs. Wolverine Supply Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 115 (Aug. 28, 2009). Discovery of plain errors of law or fact on review may require commission restraint where the parties had no notice of the error. Neither restraint nor remand is necessary if the board's decision is clear but order contains clerical error (omitted comma); commission will exercise authority to modify board order to correct a clerical error to conform the board's order to the board's decision.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). Board may not consider its own convenience in determining a petition for change of venue. Because the board based its decision on an impermissible consideration, the commission reverses the board's decision.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The evidence led the board to find that Anchorage would likely be a more convenient location for the parties and witnesses. However, the board erroneously disregarded the inconvenience and expense of retaining venue in Fairbanks because it considered the presentation of live expert testimony a matter of "election" instead of right.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The board erred in deciding that possible delay, a finding not supported by substantial evidence, outweighed the known monetary costs and travel time required of the parties and witnesses.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The last remaining issue to be decided in this case is whether claimant's disc replacement surgery is a medical treatment covered by AS 23.30.095 and does not require knowledge of the long procedural disputes between the parties. Therefore, desire to stay with the hearing officer who is familiar with claimant's case is not a consideration bearing on the "convenience of the parties."

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). Law of the case doctrine generally prohibits the reconsideration of issues that have been adjudicated in a previous appeal.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). However, commission's decision left open the possibility that the parties could request a venue change if another hearing was needed because commission based its decision on lack of evidence of the number and location of witnesses. The board left the matter open by stating the convenience of the parties "cannot be fully ascertained until the specific witnesses have been clearly identified." Law of the case doctrine did not bar employer from raising issue of venue after witnesses had been identified.

Voorhees Concrete Cutting v. Monzulla, Alaska Workers' Comp. App. Comm'n Dec. No. 114 (Aug. 6, 2009). The Chief Administrative Law Judge, not the commission, has authority to decide alleged Code of Hearing Officer Conduct violations.

Lowe's HIW, Inc. v. Anderson, Alaska Workers' Comp. App. Comm'n Dec. No. 113 (Jul. 23, 2009). Decision on motion for stay. Granted stay of lump sum past medical benefits, which, once paid to providers, cannot be recovered from the appellee because there is no provision for recovery of medical benefits paid to the provider under the Act.

Lowe's HIW, Inc. v. Anderson, Alaska Workers' Comp. App. Comm'n Dec. No. 113 (Jul. 23, 2009). Commission did not stay lump sum attorney fee award of \$53,000 because (1) not requested and (2) no evidence indicating allocation of fee between stayed portion of award and benefits not stayed; commission cannot order a stay in absence of evidence to support it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Intent of the Act, that parties should be afforded "due process and opportunity to be heard and for their arguments and evidence to be fairly considered," is implemented in part by the statutory requirement that parties receive adequate notice of a hearing and board's regulations requiring the board and parties have notice of issues and conduct of the hearing.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App.

Comm'n Dec. No. 112 (Jul. 1, 2009). Board's authority to hear and determine questions in respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties. Absent findings of "unusual and extenuating circumstances," board is limited to deciding issues delineated in the prehearing conference, and, when such circumstances require board to address other issues, sufficient notice must be given to the parties that board will address these issues.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). board failed to follow its own regulation in taking up matters not recorded in a prehearing summary; given extent of board's departure from announced issue, board's failure to give notice to the parties that it intended to go beyond record immediately before it at hearing, and lasting impact of the board's findings and order on the rights of the parties, the error was not harmless.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Extensive review of facts by board in written decision was done to justify its decision to award interim compensation until it decided the case on its merits by establishing that circumstances were sufficiently "unique" to depart from statute that terminates entitlement to TTD on reaching medical stability and to extend liability for TTD to date of board's decision on merits. Board failed to give parties opportunity to address if board had authority to make such an award under AS 23.30.155(d) and made unspoken decision on merits of claim.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). The workers' compensation board has investigatory powers, but possession of investigatory powers alone will not justify their exercise by a hearing panel in the course of adjudicating a claim, at the parties' expense, without giving notice to the parties the hearing panel intends to investigate questions not raised by the parties to the adjudicatory proceeding.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board's authority to examine books and records or compel attendance of witnesses is limited to the "questions in dispute" in a particular proceeding.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Separation of investigatory and adjudicatory function is consistent with the rule that due process requires some separation between those persons prosecuting (or investigating) the claim and those adjudicating it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). When board adjudicates, it reaches a judicial decision on a dispute between parties, it decides legal rights and obligations of parties to a particular dispute, and it issues orders fixing parties' legal obligations to each other. When making an investigation, board carries out an official inquiry or examination to find information about specific person or claim, but it does not decide the legal rights of the parties.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Purpose of the ordered examination was to decide the legal rights of parties to a claim, not to gather information for legislative purposes (as developing regulations) or executive action (granting self-insurance certificate). While board may require an examination of employee claiming or entitled to receive compensation, the board's authority to require the examination of employee's body is limited to issues in dispute when board is conducting a hearing, because purpose of examination must be to enable the board to decide the legal rights of the parties – not merely to find information. Board hearing panel's power to order an examination of persons is limited to the questions in dispute before it.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Where board could not yet have ordered an examination under AS 23.30.095(k), and board identified no specific gaps in the medical evidence or lack of understanding of the medical evidence that prevented it from adjudicating the dispute before it, the board exceeded authority to order an examination under AS 23.30.110(g).

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). In order to join claims, the claims must be in existence. Where two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is claim joinder

(or consolidation), not joinder of parties in a single claim.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board lacks authority to order an employer to pay compensation under AS 23.30.155(d) when no claim has been filed against the employer.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Generally, the commission will not consider a claim of procedural error on appeal that has not been called to the attention of the board hearing panel, unless there is plain error that affects a substantial right and is prejudicial to the result.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Board's hearing panels are administrative bodies, which developed differently from courts, and have less formal rules than courts, but this fact does not diminish board hearing panels' position as "collaborative instrumentalities of justice," and therefore, the independence of each board member and the panel as a whole must be respected.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). The parties to an administrative adjudication, as in workers' compensation proceedings, have a fundamental right to be informed of communications with board hearing panel.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). If hearing panel excludes the parties, it may not permit others to observe the panel's deliberations because parties have no way of knowing if audience comment or response affected the board's deliberations.

Alcan Elec. & Engineering, Inc. v. Redi Elec., Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 112 (Jul. 1, 2009). Presence of three unauthorized persons for the duration of the deliberations in an unrecorded session closed to the parties, was prejudicial to the substantive rights of the parties and cannot be cured because there is no way to permit the parties to respond to anything the audience may have contributed.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). Commission-provided interpreters and translators serve the commission rather than the parties. Appellant permitted to file brief in Spanish; commission provided translation. Opinion by Appeals Commissioner Hagedorn.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). Board is not required to rely on employee's physician in deciding which medical opinion is persuasive.

Abonce v. Yardarm Knot Fisheries, LLC, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (Jun. 17, 2009). When the key controversy centers on the medical evidence of causes of employee's conditions, timing alone is not enough to

satisfy this burden and establish causation of disabling condition.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission treats motion to accept a late-filed appeal as concerning dismissal of appeal for failure to prosecute the appeal, because first duty of appellant is to file a notice of appeal within 30 days. The commission will receive evidence and take testimony on a motion to accept a late-filed appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009).30 days to file appeal begins when the board's decision is filed in the board's office under AS 23.30.110, not day the appellant receives actual notice of the board's decision.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Failure to collect decision from post office after decision was mailed to last known address is not failure of delivery.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Corporation must be represented by an attorney in appeal proceedings before the commission, but party that represented corporation before the board may file notice of appeal to initiate appeal proceedings. Lack of corporate attorney will not excuse failure to file appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Filing a notice of appeal to preserve right of appeal is not onerous or complex.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission may give parties notice of conflict with commission record and reopen record to take affidavits from parties if record is unclear.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009).Read together, AS 23.30.125(a) and 127(a) require an appeal to be filed before the 31st day after the board's decision is filed.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). In the absence of prejudice to the opposing party, the commission holds that substantial compliance with AS 23.30.127(a) is sufficient to preserve an appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Substantial compliance is less than strict compliance, but it does not mean that a deadline may be ignored. Lawsons did not toll time bar by filing timely but incomplete document evidencing intent to appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Commission will excuse late filing of an appeal when good cause is presented for delay. *Bohlmann v. Alaska Constr. & Engineering, Inc.* illustrates one mechanism by which party may demonstrate good cause, i.e., party was misled by commission staff or other official instruction as to due date of appeal.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009).Literate appellant who fails to read the decision description of appeal procedures cannot claim that he should be excused because he did not read the appeal procedure advice and that he made good faith effort to file appeal on time.

Lawson d/b/a JB Services v. State, Workers' Comp. Div., Alaska Workers' Comp. Div., Alaska Workers' Comp. App. Comm'n Dec. No. 110 (May 29, 2009). Showing of absence of prejudice to the opposing parties alone is insufficient to excuse late filing of appeal; a showing of good cause to excuse a late filed appeal means party must show (1) good faith effort to comply with deadline, (2) something outside party's control prevented party from filing on time, and (3) brevity of period between filing and cessation of prevention.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). *authored by Appeals Commissioner Ulmer; Appeals Commissioner Richards concurring. Chair dissented in part. Imposition of discovery sanctions is reviewed for abuse of discretion. McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Substantial evidence in the record supports board's rejection of claim of mental incompetence as excuse for failure to attend deposition.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Board adequately considered whether lesser sanctions would protect opposing parties and deter discovery violations. Board is not required to examine every alternative remedy. Commission need not determine if board should have dismissed claim as sanction if commission concludes board could have done so because dismissal was within the range of its discretion.

McKenzie vs. Assets, Inc., Alaska
Workers' Comp. App. Comm'n Dec. No.
109 (May 14, 2009). Appellant failed to
allege spoliation of evidence by asserting
the opposing party "turned" her witness.
Spoliation is destruction or alteration of
physical evidence or its intentional
concealment until it is destroyed by
natural causes. A physician's change in
his opinion after reviewing more records
is not destruction of the original
document evincing his original opinion.
Opposing party has no duty to guard
physician's opinion against change.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). In limited instances, the commission will take opportunity presented by pro se appellant's argument on appeal, not raised below, to correct misunderstanding by an appellant so the misunderstanding is not perpetuated.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Ex parte communications are prohibited because they provide one party opportunity to influence decision-maker outside the presence of the opposing party. But, ex parte communications to tribunal staff who are not decision-makers on scheduling or similar administrative, non-substantive matters are not prohibited.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Brief expression of annoyance was not demonstration of opinion originating from source outside the evidence or demonstration of inability to render fair judgment.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Commission need not elucidate pro se appellant's constitutional challenge where none can be identified.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appellant's barrier to obtaining a lawyer in workers' compensation case is not inability to afford lawyer, because workers' compensation statutes provide ample contingency fees for attorneys. Attorneys whose services are in demand may choose to refuse to represented claimants whose cases present a greater risk than possible reward. Workers' compensation is an economic interest warranting the lowest level of scrutiny. There is no recognized constitutional right to a state-supplied lawyer to enforce economic interests.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Appeal Commissioner Richards concurs: Appellant freely chose her lay representative before the board, so cannot now claim lack of an attorney led to premature dismissal of claim.

McKenzie vs. Assets, Inc., Alaska
Workers' Comp. App. Comm'n Dec. No.
109 (May 14, 2009). Appeal
Commissioner Richards concurs: An
attorney would not have altered outcome
[dismissal of claim] where appellant's
conduct was not result of poor strategic
choice or omission by lay representatives,
but appellant's own refusal to comply
with board order.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: If appellant is represented by lay representative that board finds interferes with progression of claim, engages in questionable conduct, and impedes resolution in the claimant's interest, then board should ask claimant if claimant understands and consents to, or adopts, the sanctionable conduct by the representative before board imputes conduct to claimant and dismisses claim.

McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: Statute permitting non-attorney representation does not mean board may not, by regulation or order, require nonattorney representatives to meet basic ethical and performance standards before the board. McKenzie vs. Assets, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009). Chair dissents: Statute permits board to fashion "appropriate sanctions;" tailored sanctions of increasing severity directed toward correcting effect of sanction conduct are most "appropriate" sanctions.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Attorney's fees sought against appellant. Held: Sourdough Express, Inc. v. Barron does not require the commission to find movant filed motion in bad faith or her positions were frivolous.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Commission's emphasis of the word "any" in its two part test of a bad faith controversion in Sourdough Express was intended to convey such a complete absence of legal basis for a controversion that, even with every inference drawn in favor of validity, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Licensed adjuster who files such an utterly frivolous controversion may be presumed to have done so in bad faith without proof of malign motive because adjuster possesses a state license that (1) requires specialized education, training, and experience and (2) obligates adjuster to meet certain performance standards related to professional responsibility.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Sourdough Express test does not equate frivolity with bad faith. Commission did not hold that all conduct in the borderland between clearly good faith and patently bad faith results in frivolous or unfair controversions.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). No evidence presented movant initiated commission proceedings in bad faith. Although mistaken, incomplete, and ultimately unpersuasive, the positions movant took in her motion were not frivolous or unreasonable as a matter of law.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Pleadings or briefs by pro se litigants are read generously, but a lowering of standards for pleadings does not mean a lowering of standards for behavior; unrepresented litigants are held to the same standards of conduct as represented litigants are held to in their actions before the commission.

Rockstad vs. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 108 (May 11, 2009). Lack of an attorney does not excuse a citizen's obligation to conduct herself honestly and courteously before a tribunal. Ethical duties of courtesy, candor, honesty, diligence, fairness and cooperation are owed to tribunals by the parties, represented or not, and to each other. Lack of an attorney does not grant a party license to behave badly.

Emmet Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). Commission considers a motion to accept late-filed appeal to be like motion to dismiss the appeal for failure to prosecute, because the first duty of an appellant is to file an appeal within the time proscribed by statute.

Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). There is no statutory presumption that an appeal is filed on time, so the appellant must produce sufficient evidence to persuade commission by a preponderance of the evidence that he should be excused from compliance with statute.

Hearon vs. Westaff USA, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 107 (May 6, 2009). If board fails to mail a copy of its decision on same day it files the decision in its office, the act of "fil[ing] with the office of the board under AS 23.30.110" is incomplete. Pro se appellant's appeal would have been on time if filed Friday; but appellant believed he was late. Late filed appeal filed next working day accepted.

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Director has the right to intervene at any stage of proceedings in appeal under AS 23.30.127(a).

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Employer may presume that for an hourly worker the statutory method in AS 23.30.220(a)(4) will produce a spendable wage that fairly approximates value of the employee's wages. The employer does not err by relying on employee's reported taxable income in making an initial calculation of compensation under AS 23.30.220(a).

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). Burden is on the employee to show that AS 23.30.220(a)(4) spendable wage does not represent the equivalent of employee wages when 220(a)(4) spendable wages is derived from self-employment income. Board need not go beyond 220(a)(4) if the board finds the reported profits represent the equivalent of employee wages or the board finds that with adjustments the self employment profits represent equivalent of employee wages. Board must look at the evidence and decide the facts in each case.

Bradford T. Wilson vs. Trena Heikes, Alaska Workers' Comp. App. Comm'n Dec. No. 106 (May 4, 2009). AS 23.30.220(a)(5) applies only in cases of previously self-employed hourly workers if the board finds the employee's wage equivalent cannot be determined from self-employment records and other evidence, so that a spendable weekly wage must be calculated under 220(a)(5).

Bradford T. Wilson vs. Trena Heikes,
Alaska Workers' Comp. App. Comm'n
Dec. No. 106 (May 4, 2009). Tax records
may be used to prove reported income,
but the board is not limited to accepting
federal tax records as proof of all wage
equivalent income received by an
employee. A previously self-employed
employee is not barred from claiming
income other than income reported as
self-paid wages or salary merely because

it is taxed as a business profit instead of a self-paid wage.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Decision on motion to stay board proceedings pending appeal of final board order limiting EME from further psychiatric testing, but not interview, of claimant.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Board's decision on merits of mental illness may, if adverse to the appellee, moot the appeal, but if adverse to appellants will not moot the appeal. The risk of reversal of a decision on the merits of the claim due to appeal is borne by the appellee, but risk of rehearing, and attendant costs, is shared by appellants, appellee, and the board.

Wasser & Winters Co., Inc. v. Linke, Alaska Workers' Comp. App. Comm'n Dec. No. 105 (Apr. 28, 2009). Commission's authority to enforce its jurisdiction does not extend to staying board action to avoid waste of the board's and parties' resources.

Wasser & Winters Co., Inc. v. Linke,
Alaska Workers' Comp. App. Comm'n
Dec. No. 105 (Apr. 28, 2009). Prehearing
officer's referral of appellants' petition for
continuance to the board pending appeal
provides alternative form of relief; absent
showing that appellants requested
petition be heard before hearing on
merits, or officer refused to set it for
hearing before hearing on merits,
appellants may not assert board
unreasonably foreclosed opportunity to
allow board to make decision committed

to their discretion: whether jurisdictional conflict or potential waste of resources justify hearing continuance under 8 AAC 45.070(a).

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Title of board's decision is not conclusive of its status as a final, appealable decision for purposes of appeal to the commission.

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Neither initial decision nor decision on reconsideration disposed of the claim, so proper procedure is to bring a motion for extraordinary review under 8 AAC 57.074. Accordingly, commission treats appeal as a motion for extraordinary review.

Olson vs. Federal Express Corp., Alaska Workers' Comp. App. Comm'n Dec. No. 104 (Mar. 20, 2009). Appeal articulates no grounds for extraordinary review and appellant states she has "changed her mind" and will comply with board's order for an SIME; appeal dismissed.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Fund admitted notice of claim was timely unequivocally in answer. If board wishes, on reconsideration, to decide fact taken out of contention by prior unamended admission by the party opponent, it must give the parties notice that it intends to do so.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Party's failure to take extraordinary measures to object to late-filed brief does not excuse opponent's failure to amend answer before filing brief on reconsideration asserting contrary position.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Board assumed, contrary to Second Injury Fund v. Arctic Bowl, and the commission's decision in North Slope Borough v. Wood, that date the employee is injured is date of notice of injury for Fund purposes.

Fairbanks Mem'l Hosp. v. State, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 103 (Mar. 18, 2009). Board's failure to apply controlling precedent requires reversal instead of remand; where there is no evidence on which the board could have made a finding that employer knew, more than 100 weeks prior to notice of possible claim against fund that second injury would result in substantially greater disability than it would have done in absence of qualifying first injury.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). In proceedings before the commission, the adjudicating board panel is not represented. Argument that board panels should have unfettered discretion to set penalty could not be presented for the first time on reconsideration.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Commission may

review factors used by the board to assess penalties because the reasonableness of the factors considered by the board, where no guidance is provided by regulation, statute, or the Court, is a matter of law.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). The process by which an accused employer is brought before the board, the hearing conducted, and evidence submitted are matters of procedure on which the commission shall exercise its independent judgment.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Board may not assume the existence or nonexistence of a fact if there is no evidence to support a finding of fact. If there is no evidence that an employer can survive a penalty, the board may not assume that the employer will be able to pay it. The proponent of a fact has the burden of producing evidence to support a finding of that fact, thus if Division asserts uninsured employer can pay a certain penalty amount without going out of business, then the Division bears the burden of producing evidence that is so.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Due process requires that the neutral adjudicator, the board, assures the unrepresented accused employer a fair hearing, including adequate notice of accusation, notice of what the board may consider in setting a penalty, and opportunity to present

evidence to defend against the accusation and mitigate the severity of a penalty.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Penalty is designed to punish past conduct and, while threat of penalty may deter future conduct, past conduct will not be prevented by imposition of a penalty, and the general deterrent effect of penalties on other employers is enhanced by public hearing. Commission rejects state's argument that board is justified in assessing \$100,000 penalty without fair hearing because doing so will curb the consequences that flow from lack of insurance.

Alaska R & C Communications, LLC v. State, Div. of Workers' Comp., Alaska Workers' Comp. App. Comm'n Dec. No. 102 (Mar. 18, 2009). Nothing in AS 23.30.080(f) suggest the legislature, in devising a broader response to the problems presented by uninsured employers, eliminated the right of the accused employer to a fair, meaningful hearing before a neutral adjudicator before a civil penalty is imposed. Failure to provide any notice of the factors to be used in assessing penalties to the accused employer before assessing the penalty denied employer an opportunity for a meaningful hearing.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board erred by applying remote site doctrine to a traveling employee, electrician who traveled to village to install equipment at dock, but because the board found the fight in which the employee was injured arose out

of the employment, it is not necessary to resort to the traveling employee rule.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Traveling employee is not a remote site employee because he does not live at an employer's work camp on an ongoing, regular basis. Traveling employee travels from employer premises to point not on employer premises for the employer's business and returns to the employer's premises where regular employment duties are resumed.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Evidence of "negative interactions" is insufficient to find a workplace fight occurred in the course of employment. Injuries sustained in a fight may be compensation when the workplace fight was motivated by the employment or the workplace placed the employee at increased risk of assault.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). A limited "aggressor defense" is embodied in the presumption against a willful intention to injure oneself at AS 23.30.120(a)(4) and the claim bar in AS 23.30.235 and denies compensation to the person who struck the first blow.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The presumption in AS 23.30.120(a)(4) exists because AS 23.30.235 bars compensation for injury proximately caused by the employee's willful intent to injure or kill any person. An injury resulting from willful intent to injure is not an "accidental" injury.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The presumption in AS 23.30.120(a)(4) is a negative presumption, unlike section 120(a)(1); therefore it may be overcome by presenting substantial evidence that the employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice or (b) impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; and (2) did an act that reasonably could be expected to cause injury to himself or another.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board failed to determine if employer's evidence met part 1 (b) of the above analysis or part 2. Board's findings are not incompatible with the employer overcoming the presumption, therefore the commission remands the case to the board for further findings.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board erred by requiring employer to eliminate the possibility that the injury was not the result of the employee's willful intent to injure another.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board failed to acknowledge that the date of injury required it to apply the causal standard in AS 23.30.010, as amended in 2005.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). While the definition of legal cause changed with the 2005 amendment,

the statutory method of analyzing claims by evaluating the relative contribution of different causes to the disability" does not bar claims based on employment aggravation of prior personal injuries.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The board's assumption that the employee's ultimate disability necessarily shares the character (work-related or not work-related) of the initial injury erroneously omits the analysis required by AS 23.30.010(a).

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). The board is not required to submit all proposed expert testimony to the Daubert/Coon test to the extent the testifying expert relies on his experience as well as expertise derived from formal training. Challenges to experience-based testimony go to the weight the trier of fact should give the testimony. But, where testifying expert relied on engineering training and knowledge of scientific principles to give opinion on cause of blood spatter, and did not establish sufficient experience or expertise in blood spatter, he did not have sufficient qualifications to testify as an expert witness to what the blood spatter patterns in photographs meant.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Where surprise caused by failure to list expert witness was cured by board's ruling it would leave record open for expert's deposition, owing to the length of the hearing, the expert was not brought to the stand until 20 days after notice of his appearance was given, and opposing party failed to demonstrate

board's allowance of witness testimony was prejudicial, board's allowance of the expert witness's rebuttal testimony was not reversible error.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Commission will review a board decision to determine if board made a necessary credibility determination.

Marsh Creek v. Bentson, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (Mar. 13, 2009). Board's statement that it found witness's testimony regarding his alcohol intake credible based on a lack of evidence otherwise suggests board improperly applied a "presumption of credibility." However, in light of the extensive credibility findings in board's discussion of the testimony and characterization of witness as the "most credible of those witnesses who testified" the board's statement was an unfortunate but harmless error.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Movant failed to establish on motion for extraordinary review a strong possibility of prejudicial error outweighed sound policy favoring appeals from final board decisions. Movant did not demonstrate likelihood of foreclosure from disclosing information she believes relevant to her history of injury to SIME evaluator; waiting for the final decision on merits of her claim will not result in injustice and unnecessary delay.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). SIME examiner is not a trier of fact. Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Commission comments that a physician gains experience in assessing value and trustworthiness of medical records, but not other documents. When board includes non-medical documents in SIME binders, board should inform SIME physician that board does not, by including them for review, vouch for their credibility or reliability. Including nonmedical records may lead SIME physician to assume board vouches for its credibility, or that examiner should rely on them as a condition of the examination, or examiner should examine credibility of non-medical records or draw SIME physician into board's function. All are sound reasons for the board's policy of avoiding inclusion of non-medical records in SIME binders.

Rockstad v. Chugach Eareckson, Alaska Workers' Comp. App. Comm'n Dec. No. 100 (Feb. 20, 2009). Speculative possibility that movant might be faced with having to depose the SIME examiner is insufficient to establish grounds for review because SIME has not taken place, examiner has not issued report, and movant has not been refused an opportunity to examine, or cross-examine, SIME examiner.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). On the record before it, board should determine the usual wage for similar services performed by paid employees to calculate independent contractor's gross weekly earnings under AS 23.30.220(a)(5).

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). Self-employment profits may result in a fair approximation of employee wages, particularly if (1) the business that consists of services performed solely by the owner; (2) business assets are primarily the advanced skills, education or training of the owner and the owner performs licensed professional services to other organizations not engaged in the same business, such as engineering, architecture or the like; (3) the private practice of traditional professions, such as medicine or law, in which employment is entered only by members of the profession with limited experience, or limited to service with non-profit organizations or public service.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 099 (Feb. 2, 2009). Intent of the Act is to fairly approximate the value of an employee's lost wages, rather than to account for lost income in any capacity, to provide partial replacement for the approximate lost wages of employees, not for the lost business profits of independent contractors, so the focus in determining gross weekly earnings when self-employment must be included under AS 23.30.220 should be on the value of the claimant's services to a business, not net business profits.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission has no authority to "certify" question to supreme court; principle that administrative agency has no power to decide constitutional question does not grant the commission authority to ask the Supreme

Court to decide a constitutional question before it reviews board's decision.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Purpose of administrative exhaustion "is to allow an administrative agency to perform functions within its special competence – to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies. When claim raises ONLY constitutional issues, exhaustion doctrine may not apply, and the claimant may file declaratory judgment action in Superior Court.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission applies a second tier of independent judgment to correct board errors of law arising from application of the Alaska Workers' Compensation Act.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Cases raising constitutional issues require fair, careful and thoughtful review to determine if board has substantial evidence to support its findings, made required findings of fact, and correctly applied challenged statute; especially in "as applied" challenges.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Commission review ensures that when presented to the Supreme Court the constitutional challenge is both unavoidable and well-grounded in fact; instead of an unnecessary challenge based on hypothetical or unsupported facts.

Wilson v. Eastside Carpet Co., Alaska Workers' Comp. App. Comm'n Dec. No. 098 (Feb. 2, 2009). Appellant's challenge to the fundamental policy underlying the statute and the board's decision requires the commission to set out what that policy is, and determine if "the board's decision . . . creates bad public policy in contravention of the Act."

Alcan Electrical and Engineering, Inc. v. Hope, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (Jan. 23, 2009). Grant of motion for extraordinary review movants demonstrated strong possibility that the board departed from its regulations and requirements of due process by (1) ordering the movants to pay TTD compensation without notice or opportunity to respond to claim against them, and (2) ordering cross-movants to pay for, and respondent to attend, a SIME without notice to parties. Alcan Electrical and Engineering, Inc. v. Hope, Alaska Workers' Comp. App. Comm'n Dec. No. 097 (Jan. 23, 2009). Board-ordered SIME cost not reimbursed under 155(d), and as board ordered SIME, and named the examiner, without notice a party is unable to challenge the examiner or need for examination as provided under 8 AAC 45.092. Dissent by Appeals Comm'ner Hagedorn on stay.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). In examining motion for extraordinary review, Commission measures demonstration of prejudice to the movant by weighing the issues raised against the sound policy favoring appeals from final orders or decisions, so that consideration of asserted board error does not result in officious intermeddling by the commission.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). MER denied where decision by commission would only add to the board's delay in deciding case, without advancing the resolution of the case, and issues could be preserved by appeal.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). The question if board may require an employer to produce an SIME examiner who is resident in another state to appear and answer questions in Alaska, when the board itself has no power to subpoena the citizen of a sister state, is a serious question of due process regardless of the cost to the employer of such a proceeding.

City of Petersburg v. Tolson, Alaska Workers' Comp. App. Comm'n Dec. No. 096 (Jan. 23, 2009). Commission in comment recognized undue delay as violation of due process, if the risk of error has increased with delay, e.g. evidence and testimony presented at hearing are forgotten, delay beyond a member's term. Commission noted the parties' have a due process interest in the prompt, fair adjudication of their claims and defenses, and that once the matter has been brought to hearing, the board's primary duty is to engage in fair decision-making on the evidence in the record.