Alaska Workers' Compensation Appeals Commission

Carl E. Kelly,
Appellant,

vs.

State of Alaska, Department of Corrections,
Appellee.

Final Decision
Decision No. 049 July 13, 2007

AWCAC Appeal No. 06-030
AWCB Decision No. 06-0260
AWCB Case No. 199508871

Final Decision on appeal from Alaska Workers' Compensation Board Decision No. 06-0260, issued on September 26, 2006, by the southcentral panel at Anchorage, Rebecca Pauli, Chair, John A. Abshire, Member for Labor, Linda Hutchings, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant Carl E. Kelly. Talis J. Colberg, Attorney General, and Joseph M. Cooper, Assistant Attorney General, for appellee State of Alaska, Department of Corrections.

Commissioners: Stephen T. Hagedorn, Jim Robison, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

This appeal asks the commission to reverse the board's decision denying the employee's claim for permanent total disability due to mental illness caused by mental stress in the employment. We conclude the board's refusal to exercise its equitable powers to bar the employer from asserting a defense against the claim based on lack of compensability was not an abuse of the board's discretion. We conclude the board's admission, for limited purposes, of a record of a decision by another adjudicatory body was not an abuse of discretion. Because there is substantial evidence in light of the whole record to support the board's findings of fact, we affirm the board's denial of the claim. Finally, we decline to consider and adopt a rule, advocated by the appellant, that if the employee is the victim of conduct that may be defined as a crime, the employee

necessarily suffers pressures and tensions in the employment that are "per se" extraordinary and unusual.

Factual background.

Carl Kelly was born in Alaska, raised in Ninilchik, and entered the U.S. Navy after graduation from high school.[1] After discharge from the Navy, he worked at a variety of jobs, including long haul truck driver, parts room manager, and air traffic controller. He also reenlisted in the Navy for a short tour during this period. In 1987 he applied, and was accepted, for a position as a correctional officer with the State of Alaska Department of Corrections. He attended the training academy, and was assigned to the Cook Inlet Pre-Trial Facility.

Kelly was initially nervous around prisoners, but he obtained good evaluations. In 1992, according to Kelly, the number of younger inmates increased, and Kelly found it more stressful to deal with these inmates:

> These young kids going into prison now don't care who they fight with, where they fight, what the fight is about. They will fight at the drop of a hat. . . . [T]he older ones, before we had the kids, there was little tension up until the time they got sentenced and maybe for a little bit after they were sentenced. You did not have the fights. . . . [W]e mixed the younger kids with the older population. The older population held them down. But then as we started getting more . . . kids in, they couldn't mix them as much, and that's when it got hard and I could not deal with it.[2]

Nonetheless, he continued to receive good evaluations, and was promoted to booking officer, which he performed on alternating weeks with rover and module officer duties.

On April 12, 1995, Kelly reported feeling short of breath and as though his blood pressure was rising. He was taken to the hospital with chest pain complaints, and admitted. He filed a report of injury, dated May 5, 1995, in which he reported "chest

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[1] The facts are drawn from the board's record. Our summary should not be construed as findings of fact, but as a means of putting this appeal in its factual context.

[2] Kelly Depo. 60:12 – 61:7.

pains, shortness of breath, high blood pressure, dizziness." The nature of the injury was reported as "angina."

On May 10, 1995, Kelly's physician, internist Edward D. Brown, M.D., reported that Kelly was suffering from chest pain, hypertension, and borderline tachycardia; with "significant anxiety contributing and probably causing chest pain."[3] Dr. Brown referred Kelly to a psychiatrist, Dr. Matsutani, who diagnosed post-traumatic stress disorder.[4] Dr. Brown reported October 30, 1995 that Kelly was "unable to work due to the stress and recurrent episodes of chest pain that are manifestations of his posttraumatic stress disorder."[5] That same month, Kelly applied to the Division of Retirement and Benefits for occupational disability benefits under the Public Employees' Retirement System (PERS).

In June of 1996, Corrections' adjuster sent Kelly to an evaluation by James Robinson, M.D., Ph.D., a rehabilitation medicine specialist and a psychiatrist.[6] Dr. Robinson's evaluation raised an issue of potentially heavy alcohol abuse, and he recommended that Kelly be evaluated by a specialist in that field. Dr. Robinson felt it was important to explore the possibility of alcohol dependence because the anxiety Kelly exhibited could be due to withdrawal rather than a psychiatric problem. He also noted that Kelly had a "history of chest pain possibly due to angina" and "hypertension."

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[3] R. 1058.

[4] R. 1229.

[5] R. 1078. Dr. Brown also wrote to the Division of Retirement and Benefits that Kelly's "physical findings have repeatedly revealed tremulousness, borderline or elevated blood pressures, tachycardia and intermittent diaphoresis on exam." R. 1238. He reported that Kelly's "anxiety and chest pain are probably related to his job stress." *Id.*

[6] Dr. Robinson's report is at R. 1248-55.

In September of 1996, Kelly was seen by Greg McCarthy, M.D., a psychiatrist at the Langdon Clinic.[7] Dr. McCarthy gave alcohol dependency, chronic back pain and hypertension as firm diagnoses, while suggesting that others (major depressive disorder, post-traumatic stress disorder, personality disorder) be ruled out. Like Dr. Robinson, he noted that Kelly's drinking history "colors most of his current, as well as past, psychological symptoms." He reported that many of his symptoms could be "a direct result of alcohol consumption." It was, Dr. McCarthy reported, "quite likely that he has had problems with drinking for some time, and that this predates difficulties at Cook Inlet Pretrial facility." Dr. McCarthy considered Kelly totally disabled, primarily as a result of his drinking.[8]

About a year later, on September 25, 1997, Kelly was evaluated by Dan Marman, a therapist at Providence Breakthrough, a chemical dependency recovery program.[9] Mr. Marman reported that Kelly admitted to "drinking all week long" on his weeks off, and that his alcohol use progressively increased until he began "heavy drinking" after he was "put on workmen's comp." Kelly reported to Marman that he stopped drinking on October 23, 1996, and that he had abstained completely since then. Kelly also reported that the medication prescribed by Dr. Matsutani had been helpful, but "he has never received any counseling or psychotherapy for his PTSD condition."

In December 1997, Dr. Robinson again examined Kelly.[10] He reported that the "validity of the evaluation was compromised" by the anger, irritability, and verbal abuse Kelly displayed toward Dr. Robinson. Dr. Robinson reported that Kelly "was clearly not

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[7] Dr. McCarthy's report is at R. 1465-69.

[8] Kelly's response to Dr. McCarthy's report was detailed by Dr. McCarthy in his report of a re-examination on September 29, 1998: "He said my report was phony . . . He felt I was collaborating with the State to deny him benefits that he rightfully had coming to him. . . . Overall, his presentation today was similar to how Dr. Robinson described him in his 12-20-97 report." R. 1482.

[9] Mr. Marman's report is at R. 1273-74.

[10] Dr. Robinson's report is at R. 1282-89.

interested in being cooperative." He also reported that Kelly told him he had not had any alcohol in the past 14 months, and he had no evidence otherwise. Dr. Robinson reported he agreed that Kelly was medically stable, but that, due to the "ongoing uncertainty with respect to his alcohol use until the very recent past," he was unable to date the time of medical stability. He roughly estimated Kelly was medically stable on the date of Marman's alcohol dependency evaluation (September 25, 1997). Dr. Robinson did not consider Kelly disabled from employment, but believed that vocational rehabilitation was realistic. He said that there was a significant risk that Kelly would be combative with supervisors and co-workers or again report disabling chest pain. It would not be reasonable to return him to work as a correctional officer because of his "interpersonal difficulties." Dr. Robinson also stated:

> As noted above, I have no detailed information about Mr. Kelly's psychological functioning prior to his injury of 04/12/95. However, it appears that there has been a significant deterioration in his psychological functioning that is temporally related to on the job stresses in his work as a corrections officer. Thus, I believe he does have ratable impairment as a result of the industrial injury of 04/12/95.[11]

On February 27, 1998, Dr. Robinson reported a 12 percent permanent partial impairment of the whole man function.[12] Corrections paid the appropriate permanent partial impairment compensation, which ended on April 19, 1998.[13]

Kelly was referred for reemployment benefits, and he was found eligible for benefits.[14] A plan was developed and training provided to return him to work as a

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[11] R. 1289.

[12] R. 1290.

[13] It appears Kelly's permanent partial impairment award was paid by reclassifying temporary total disability compensation that had been paid after a medical stability date while awaiting the impairment rating report. R. 0005-07.

[14] The employer's adjuster requested the reemployment benefits eligibility evaluation February 25, 1998, citing Kelly's inability to return to his employment as a correctional officer. R. 1714. He was found eligible May 12, 1998 based on a prediction

computer technician. The adjuster and Kelly agreed to the plan.[15] Kelly received stipend benefits under AS 23.30.041(k) during the plan. After training, Kelly was placed in a job and on October 31, 2000, Corrections ceased stipend payments.[16]

Meanwhile, Kelly had been denied occupational disability benefits under PERS and had appealed to the Public Employees' Retirement Board (Retirement Board). His appeal was heard on February 16, 2000.[17] The Retirement Board decided that Kelly's testimony was critical in respect of his statements to the board and his representations of his history to the physicians who base their determinations based on that history.[18] The Retirement Board must carefully assess Kelly's credibility; therefore it required "further factual information to test that credibility before it can make a definitive determination."[19] The Retirement Board asked Kelly to produce documentary verification of specific factual statements. The Retirement Board ruled that, if Kelly produced the documents, he would be allowed benefits; but, if he did not produce them within six months, the Retirement Board would deny his claim on the grounds that his testimony is not credible.[20]

Shortly before the end of the reemployment plan, Kelly filed a claim for medical transport benefits from Ninilchik to Anchorage, (where Dr. Matsutani and Dr. Brown are

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that his permanent *physical* capacities are less than those required by his job at the time of injury. R. 1737.

[15] R. 1766.

[16] R. 0013-14. At hearing Kelly contended he was unable to continue in his employment due to his inability to work well with customers. However, his former employer testified that otherwise he was dependable, punctual, and good at fixing computers. He also testified he did some work for Ninilchik area businesses on his own.

[17] Public Employees' Retirement Board Dec. No. 2000-04 (February 29, 2000) (Wellington, Chair).

[18] *Id.* at 4.

[19] *Id.*

[20] *Id.* at 5.

located) instead of from Ninilchik to Soldotna (where another psychiatrist was available).[21] His claim listed the injury as "post traumatic stress syndrome," but his attending physician was listed as Dr. Ed Brown, his internist. An answer[22] was filed by Corrections' adjuster, which included the following admission: "Mileage for medical appointments from the claimant's home to Soldotna, approximately 77.20 miles." Mileage charges to Anchorage were denied, because "the nearest point of an adequate medical facility is in Soldotna, where Dr. Jeffrey Magee, a licensed psychiatrist, has been practicing since 1994." In addition, the adjuster "reserve[d] the right to assert additional affirmative defenses as discovery takes place."

A pre-hearing conference took place on October 12, 2000. Kelly was represented by an attorney, but Corrections was not.[23] In the pre-hearing conference the adjuster agreed to reimburse the internet provider fee for Kelly's classes and Kelly's attorney agreed to enter an appearance. The pre-hearing officer did not schedule further conferences.

At Kelly's request, a pre-hearing conference was held on April 22, 2002. In the pre-hearing conference, Kelly amended his 2000 claim to include a claim for permanent total disability compensation, from November 1, 2000, and continuing thereafter.[24] The parties agreed to coordinate scheduling depositions, and Corrections to file an answer to the amended claim.[25] Further pre-hearing conferences were held on June 27, 2002;[26] December 17, 2002;[27] February 27, 2003;[28] October 22, 2004;[29] November 23,

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[21] R. 0047-49.

[22] R. 0051-52.

[23] R. 1631.

[24] R. 1635. No new claim document was filed.

[25] R. 0056. All benefits were controverted April 22, 2004. R. 0015.

[26] The officer ordered Kelly to sign federal veterans' affairs releases to obtain military records. The pre-hearing conference summary also states "Parties agreed that the EE is making claim for PTSD." R. 1638. Kelly subsequently petitioned for a protective order, asserting, among other arguments, that "there is no dispute regarding

2004;[30] March 17, 2005;[31] October 21, 2005;[32] November 1, 2005;[33] and January 26, 2006.[34]

Kelly was seen by Dr. Lipscomb at Corrections' request on May 5, 2003. In the evaluation, Kelly denied any emotional difficulties. Dr. Lipscomb reported that Kelly refused to answer some questions, sounding angry as he did so. She found no gross evidence of cognitive impairment, but, like Dr. Robinson, Dr. Lipscomb noted that Kelly was not very psychologically insightful.

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causation of Kelly's PTSD" so that old records were not relevant. R. 0070. Corrections did not agree, noting that Kelly's original claim of injury was for "angina" and that he had only recently amended it to include PTSD. R. 0090. The board decision on the protective order found that the releases were "likely to lead to admissible evidence relative to the employee's claim for permanent total disability from the PTSD" and allowed the discovery. *Carl E. Kelly v. State of Alaska, Dep't of Corrections,* AWCB Dec. No. 02-0171, 5 (August 29, 2002); R. 0099.

[27] The summary notes that the signed releases were received November 12, 2002, that they were sent out beginning November 15, 2002, and no response had yet been received from the national records center in St. Louis. The summary also states that the employer would arrange an employer medical evaluation after the records were received. R. 1643.

[28] Corrections had not received the military records, but it was directed to schedule the employer medical evaluation even if it had not received the records. R. 1647.

[29] The parties agreed to a board-appointed second independent medical examination. R. 1653.

[30] The directions for the second independent medical examination were given and Dr. Ronald Early was appointed to perform the examination. R. 1656.

[31] R. 1622. Dr. Early's report had been received. No further conferences would be scheduled until a party requested one.

[32] R. 1666. The hearing was set for January 25, 2006.

[33] R. 1668. The parties agreed to move the hearing to March 23, 2005.

[34] R. 1672. The hearing was moved to May 31, 2006 due to witness unavailability.

Dr. Lipscomb issued her report on July 15, 2003.[35] She disagreed with the diagnosis of post-traumatic stress disorder. She believed he had an anxiety disorder with sporadic panic attacks. She noted that the basis for the post-traumatic stress disorder was Kelly's reports of severe combat trauma during the Vietnam War. "The stress he experienced during his employment," she wrote, "could have been sufficient to cause or aggravate an anxiety disorder, not otherwise specified, but the incident in April 1995 would not have been of sufficient magnitude to count as a qualifying stressor for PTSD according to DSM-IV."[36] She asserted that he could return to work as a microcomputer technician. Based on Dr. Lipscomb's evaluation, Corrections controverted all benefits filed April 22, 2004.

The pre-hearing officer directed that a second independent medical examination be performed by Ronald Early, M.D., Ph.D.[37] Dr. Early's report was received March 1, 2005.[38] Unlike Dr. Lipscomb, Dr. Early felt that Kelly met the diagnostic criteria for post-traumatic stress disorder. He believed that the experiences that Kelly described to him "are consistent with the psychological trauma necessary for the development of Post-Traumatic Stress Disorder and his symptoms and symptom pattern is supportive of that diagnosis."[39] Dr. Early reported:

> Other correctional officers may have experienced threats to their lives or threats of harm. However, Mr. Kelly clearly identified his experiences as terrifying and psychologically traumatic to him. The cumulative psychological trauma associated with repeated threats to his life or well being suggests that *his perception of the trauma was in excess of what he would anticipate as part of*

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35 R. 1421-45.

36 R. 1444.

37 R. 1656, 1541.

38 R. 1604-1629.

39 R. 1625.

> *his job duties,* even though he worked in a generally risky environment.[40] (Emphasis added.)

Dr. Early agreed with Dr. Lipscomb that Kelly could work as a microcomputer specialist, but not as a correctional officer.[41] He believed Kelly was medically stable "probably . . . in September of 1998."[42]

In May of 2006, depositions were taken of Dr. Early, Kelly, and Loretta Curtis, a vocational rehabilitation expert.[43] Dr. Early explained in his deposition that whether other officers experienced the same conditions would not necessarily mean they experienced the same stress.[44] Most people recover from trauma and have no residuals, he added, even if they experience the same stress as those who do not. The determination of the diagnosis is not, Dr. Early said, "whether anyone else has ever experienced the same type of trauma. The determination is based on whether the psychic trauma is considered to have been life-threatening *as perceived by the individual*."[45]

The board heard the claim on May 31, 2006. The board found that although it may grant equitable relief, Kelly was unable to invoke such relief because, the board found, he had not been prejudiced by any employer neglect.[46] The board also found

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[40] R. 1627.

[41] R. 1628.

[42] R. 1628.

[43] Dr. Matsutani's deposition was taken for the PERS appeal January 26, 1999. He thought Kelly's post-traumatic stress disorder was causally related to, or aggravated or accelerated by, his work, "or that's the way it was presented to [him]." Matsutani Depo. 14:7-21. He believed the condition would wax and wane, but that he should not be returned to work as a corrections officer. *Id.* at 14:24-15:1.

[44] Early Depo. 27:18-19.

[45] Early Depo. 28:13-21. (Emphasis added.)

[46] *Carl E. Kelly v. State, Dep't of Corrections,* AWCB Dec. No. 06-0260, 19 (September 26, 2006).

that Kelly's post-traumatic stress illness was not compensable because it was not the result of "extraordinary or unusual in comparison to pressures and tensions experienced by other corrections officers"[47] and therefore did not fulfil part of the test for compensability under former AS 23.30.265(17). The board denied Kelly's claims for permanent total disability and transportation expenses for therapy for post-traumatic stress disorder. This appeal followed.

Discussion.

1. *Standard of review.*

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[48] Because the commission makes its decision based on the record before the board, the briefs, and oral argument,[49] no new evidence may be presented to the commission. The board's determination of the credibility of a witness appearing before the board is binding on the commission.[50]

The commission exercises its independent judgment on questions of law and procedure.[51] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[52] When this commission must exercise independent judgment to interpret the law, where it has not been addressed by the Alaska State Legislature or the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers'

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47 *Id.* at 21.

48 AS 23.30.128(b).

49 AS 23.30.128(a).

50 AS 23.30.128(b).

51 AS 23.30.128(b).

52 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

compensation,[53] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[54]

2. The board did not err in refusing to bar the employer from asserting a defense that the employee's mental illness was not compensable.

Kelly argues the board erred by not barring the employer from asserting a defense against the claim based on the compensability of Kelly's post-traumatic stress disorder. [55] Kelly argues that payment of compensation and reemployment benefits from April 13, 1995 to October 31, 2000, together with failure to assert a defense that

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[53] *See, Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[54] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[55] Kelly used the word "compensable" to mean that his post-traumatic stress disorder was an "injury" within the meaning of the Workers' Compensation Act, as defined by then AS 23.30.265(17), which provided:

> (17) "injury" means accidental injury or death arising out of and in the course of employment, and an occupational disease or infection which arises naturally out of the employment or which naturally or unavoidably results from an accidental injury; "injury" includes breakage or damage to eyeglasses, hearing aids, dentures, or any prosthetic devices which function as part of the body and further includes an injury caused by the wilful act of a third person directed against an employee because of the employment; "injury" does not include mental injury caused by mental stress unless it is established that (A) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment, and (B) the work stress was the predominant cause of the mental injury; the amount of work stress shall be measured by actual events; a mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action, taken in good faith by the employer;

Kelly argues that Corrections was barred from litigating whether he had satisfied the qualifications in AS 23.30.295(17)(A) or (B).

Kelly's post-traumatic stress disorder was not compensable until April 20, 2004, is sufficient neglect to insist on the right to contest payment that it would convey to a reasonable person that Corrections would not contest entitlement to permanent total disability compensation in the future.

Kelly does not argue that the board wrongly understood that prejudice to the proponent is one of the elements of equitable estoppel. Instead, he argues that the board's reliance on our decision in *S&W Radiator v. Flynn*,[56] and inferentially *Childs v. Copper Valley Elec. Ass'n*,[57] was misplaced because (1) *Childs* is distinguishable on the facts, and (2) *Flynn* contains only commission dicta regarding payment of medical benefits constituting acceptance of the claim. The board, Kelly argues, had an adequate evidentiary basis for application of equitable estoppel and ought to have applied it due to the lengthy period between the initial appearance of references to mental illness in Kelly's medical records and Corrections' initial questioning or controversion of the claim for mental illness.

We disagree. By making payments required by law without an award, an employer does not affirmatively consent to liability for compensation, just as an employee does not manifest agreement with the compensation due by accepting

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[56] AWCAC Dec. 016 (August 4, 2006). In that case we said that

> quasi-estoppel will preclude a party from taking a position inconsistent with one the party has previously taken, when circumstances render assertion of second position unconscionable. *Keener v. State,* 889 P.2d 1063, 1067 (Alaska 1995). In applying the doctrine of quasi-estoppel, the trier of fact must consider whether the party asserting a position inconsistent with its first position has gained an advantage or produced some disadvantage through the first position, whether the inconsistency was of such significance as to make present assertion unconscionable, and whether the first assertion was based on full knowledge of facts. *Id.,* at 1067-68.

S&W Radiator v. Flynn, AWCAC Dec. 016, 17 n. 83 (August 4, 2006).

[57] 860 P.2d 1184 (Alaska 1993).

payment. Alaska law requires payment within two weeks of knowledge of the injury.[58] Notice of a controversion, if made, must be sent within 21 days of knowledge of the injury, or if the employer controverts "the right to compensation after payments have begun," the notice must be filed within seven days of the installment due.[59] The act does not limit the time period for controversion, but it permits an employer to controvert the right to compensation at any time after payments are made without an award, so long as the controversion is made within seven days of the payment due date.[60]

On the other hand, Alaska law requires an employer to notify the employee if the employer exercises its right to controvert compensation,[61] and restricts the employer's right to controvert the employee's right to compensation until the employer has "sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."[62] Until the employer possesses such evidence, the "right to controvert" is not ripe, because the employer may not legitimately exercise it.

To support board consideration of equitable estoppel, Kelly must produce sufficient evidence to support a finding of all the elements of equitable estoppel.[63] Kelly

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[58] AS 23.30.155(b).

[59] AS 23.30.155(d).

[60] Limiting the time when an employer may fully controvert a right to compensation; or requiring a notice of acceptance of liability is a matter for legislative action.

[61] AS 23.30.155(a).

[62] *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992).

[63] The elements of estoppel are: assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice. *Wausau Ins. Co. v. Van Biene,* 847 P.2d 584, 588 (Alaska 1999). Because a key element of estoppel is communication of a position, "it follows that neglect to insist upon a right only results in an estoppel, or an implied waiver, when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future

does not argue that the initial payments by Corrections were improper. Instead, he argues that at some point after he was diagnosed with a mental illness, Corrections should have controverted payments of compensation and medical benefits on the grounds that his mental illness was not compensable. Thus, if Kelly asserts equitable estoppel based on neglect of the employer's right to controvert, he must present evidence that (1) the right to controvert was ripe before the period of neglect began, and (2) Corrections' conduct directly and unequivocally demonstrated an intent to waive the right, or (3) Corrections conduct (a) was inconsistent with any intention other than an intent to waive or abandon the right or (b) was relied on by Kelly and Kelly was prejudiced by Corrections' neglectful conduct. [64] Because Kelly argues on appeal that Corrections' conduct can only be explained by acceptance of liability for a mental illness induced by mental stress under AS 23.30.265(17), we examine whether there was sufficient evidence for the board to consider Kelly's argument, as well as whether the board's ruling based on lack of prejudice was an abuse of discretion.

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pursue the legal right in question." *Id.* at 589. Implied waiver, a variant of equitable estoppel, occurs when a party's course of conduct shows an intention to waive a right *or* such conduct *is inconsistent with any intention other than a waiver*, *or* if neglect to insist upon the right causes prejudice to another party. *Milne v. Anderson,* 576 P.2d 109, 112 (Alaska 1978).

[64] We are not persuaded by Corrections' argument that to apply equitable estoppel against a state agency employer, the employee must demonstrate a fourth element under *Brandel v. State,* 128 P.3d 732, 741 n. 48 (Alaska 2006): that the estoppel serves the interest of justice so as to limit public injury. (Appellee's Br. 14). The state, when adjusting its employees' workers' compensation injuries, does not exercise its police powers as a government agency permitting, licensing, or adjudicating a contested private interest; it is acting as an employer subject to the state's workers' compensation laws and regulations. The state is named in the definition of "employer" at AS 23.30.395(20) ((AS 23.30.265(13) at the time Kelly was injured). We believe the state, when it acts as an employer, is subject to estoppel no more or less than other employers are. When the state acts as an adjudicatory or permitting agency in workers' compensation matters, as when the board grants self-insurance certificates, application of the fourth prong is required. *See, State, Dep't of Comm. and Economic Development v. Schnell,* 8 P.3d 351, 356 (Alaska 2000).

a. Kelly failed to establish that he communicated to the employer abandonment of his original theory of injury in favor of a theory based exclusively on mental illness induced by work stress.

Kelly claims that Corrections failed to assert a defense to a claim of mental stress induced mental illness for nine years[65] and that nine years is a sufficient period of time to constitute neglect of a right to controversion. Underlying this argument is the premise that Kelly clearly asserted he was disabled by mental stress induced mental illness *but not by a mental stress induced physical illness* nine years prior to Corrections' controversion on April 20, 2004 – that is, by April 20, 1995.[66] We find no evidence in the record that Kelly abandoned his initial assertion of a physical illness induced by or worsened by mental stress in his employment nine years prior to the controversion. In October 1995, Kelly's physician noted diagnoses of "chest pain associated with anxiety" and "hypertension."[67] Kelly's physician noted concurrent diagnoses of "depression, anxiety, and what I feel is post-traumatic stress disorder." Kelly's argument suggests the employer must immediately controvert payment of compensation, even if treatment of the physical illness (to which the employee continues to claim he is entitled) is not particularly differentiated by the physician from treatment for the mental illness and the

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[65] Appellant's Br. at 12. Kelly argues the relevant period begins at the first mention of mental illness in Dr. Brown's medical reports in May 1995 and ends with the filing of a controversion based on Dr. Lipscomb's report in April 2004. Because the board adjudicated the issue (whether Corrections admitted causation) in its decision on the petition for protective order in *Carl E. Kelly v. State of Alaska, Dep't of Corrections,* AWCB Dec. No. 02-0171 (August 29, 2002), the relevant period ended in 2002, when no reasonable person could believe Corrections was not going to pursue the legal right to require Kelly to prove all elements of his mental stress induced mental illness claim.

[66] If, before the payments ceased, Kelly had renounced a right to compensation and medical care on a theory of physical illness caused or worsened by ordinary work stress, (including a need for treatment of a concurrent mental illness to control the physical illness) his argument that the payment of compensation was inconsistent with any intent other than abandonment of a legal right would be stronger.

[67] R. 1078. We also note that Kelly's application for occupational disability compensation was based on "stress/angina."

benefits would not necessarily change.[68] Kelly produced no evidence that he could not possibly have been entitled to substantially the same temporary total disability compensation and medical care for treatment of recurrent chest pain due to anxiety.[69]

Moreover, it is clear that Kelly continued to assert to Corrections that his heart and blood pressure problems were a reason he was disabled even after he began treatment for post-traumatic stress disorder. Dr. Robinson reported in his June 8, 1996 report that "[t]he patient made it clear that he attributes his hypertension, cardiac symptoms and emotional distress to his job." Kelly's physical symptoms continued to play a role in Dr. Robinson's 1997 report, where he noted that Kelly would resist efforts toward rehabilitation and that there was "a significant risk he will escalate if and when vocational rehabilitation is attempted . . . possibility is that he will again report *disabling chest pain.*"

We find no evidence on which the board might have relied to support a finding that Kelly clearly and unequivocally communicated to Corrections that he did not suffer from a concurrent disabling physical illness induced or worsened by stress in his employment during the period that he received temporary total disability compensation and reemployment benefits, or that he renounced benefits based on such a physical injury before the verbal amendment of his claim in April 2002. Thus, while Kelly might have filed a claim for benefits for a concurrent mental illness sooner than August 2000, in the face of Kelly's continuing assertion that his physical symptoms were disabling, Corrections' failure to controvert disability compensation would not have been the kind of clear, unequivocal conduct that a reasonable person would have relied on to believe

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[68] We note that Kelly's August 2000 claim lists his internist, Dr. Brown, not his psychiatrist, as his attending physician, suggesting that even then Kelly had not abandoned a physical illness basis to his claim. He saw Dr. Matsutani twice a year.

[69] See our comment below at n. 73 regarding the treatment of alcoholism as a physical illness.

that Corrections would not in the future pursue the legal right to controvert a claim for compensation based solely on a mental illness.[70]

b. *Kelly failed to demonstrate that Corrections asserted an inconsistent position by payment of compensation*.

Kelly also claims that Corrections asserted a position by "accepting" a claim based on mental stress and paying benefits;[71] therefore, he argues, it is unconscionable to allow Corrections to deny coverage of the mental illness now.[72] However, as we noted above, Kelly continued to assert that his cardiac symptoms were disabling, and his continuing assertion also undermines his present claim that the employer's benefit payments constituted acceptance of liability for a concurrent mental illness injury induced by extraordinary and unusual mental stress. We conclude that it would not be inconsistent for Corrections to deny that work-related mental stress was extraordinary and unusual in comparison to that suffered by co-workers so that a resultant *mental* illness is not compensable, but to pay compensation for a totally disabling *physical*

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[70] Corrections ceased payments to Kelly in October 2000, on the grounds his reemployment plan was complete. By August 2002, the parties had argued the issue whether the employer had admitted causation of mental illness to the board. Therefore, the purported period of neglect to insist on a right is less than two years, from August 2000 when Kelly filed a claim listing his injury as post-traumatic stress disorder to June 27, 2002 pre-hearing conference. Considering that the Supreme Court upheld the board's denial of laches to bar a compensability defense after payment of benefits for more than a decade in *W.R. Grasle Co. v. Mumby*, 833 P.2d 10 (Alaska 1992), we cannot conclude as a matter of law that almost two years constitutes so extended a period of neglect of a right that a reasonable mind would believe that the neglectful party had abandoned its legal rights.

[71] We have previously discussed at length why acceptance of liability for an injury by payment without an award is not a concept embodied in the Alaska Workers' Compensation Act. *S&W Radiator v. Flynn,* AWCAC Dec. 016, 19-21 (August 4, 2006).

[72] Kelly relies on *Smith v. Marchant Enterprises, Inc.,* 791 P.2d 354, 356 (Alaska 1990). In *Smith v. Marchant Enterprises, Inc.,* the Court concluded that no inconsistency existed between Smith's claims against different employers because her theories of liability were "not based on inconsistent pleadings or inconsistent evidence." *Id.* at 357. Here we conclude that payment (employer conduct) under one claim theory was not inconsistent with denial of liability under another claim theory.

illness worsened by ordinary mental stress and to provide psychiatric care as part of the treatment designed to alleviate the physical illness.[73]

In examining employer conduct in a claim for estoppel, the board is not required to determine whether, in hindsight, the employer might have exercised other choices: taken a more aggressive stance, used another strategy that may have produced better results for the employer, or taken another position.[74] Rather, the board need only determine, without comparison to other possible conduct, whether the conduct the employer actually engaged in is such that a reasonable mind would believe that the employer meant to abandon a specific legal right, that the employee reasonably relied on that communication, and the employee was prejudiced by the reliance or that the

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[73] *See, Parris-Eastlake v. State, Dep't of Law,* 26 P.3d 1099, 1106 (Alaska 2001) (holding the board did not err in treating a drug addiction as a physical illness because there was "no evidence to rebut the settled medical authority that treats drug addiction or dependence as having a physiological component"). We note that Thomas A. Rodgers, M.D., a psychiatrist with the Juneau Alliance for the Mentally Ill, who reviewed Kelly's records for the PERS administrator, advised the Division of Retirement and Benefits that it is "difficult to know if the stressors [of his work] lead to his heavy drinking which then caused the anxiety and depression or if it is the other way round." R. 1478.

[74] The focus of Kelly's appeal is employer conduct – not employer pleadings – so our decision here focuses on conduct. However, Kelly also asserts that the answer filed by the employer to the August 2000 claim admitted liability (Appellant's Br. 6) for a mental illness induced by mental stress. The August 2000 claim listed a diagnosis of post-traumatic stress disorder and requested transport benefits for travel to Anchorage. However, the basis of Kelly's claim was that his transport had been paid previously – and it was unfair to change his arrangement by limiting payment to the nearest point of care. Kelly did not clearly state in his August 2000 claim that he had abandoned his theory of mental stress induced physical illness. The answers to the claim and the November 2002 amendment do not contain an admission that Kelly had suffered work stress that was extraordinary and unusual in comparison to other employees in comparable work environments and clearly reserved further defenses. The board may require proof of the fact that a party fails to deny in an answer. 8 AAC 45.050(c)(1). The board's decision in *Carl E. Kelly v. State, Dep't of Corrections,* AWCB Dec. No. 02-0171 (August 29, 2002) (rejecting Kelly's argument that causation was admitted and permitting discovery of Kelly's past history for purposes of a psychiatric evaluation over Kelly's objection), indicates the board would require proof of the elements of Kelly's mental illness claim based on mental work stress.

employer's conduct was inconsistent with any intention other than an intent to waive or abandon the right.

There is substantial evidence in the record that Kelly asserted to the employer that he had a physical illness, caused or worsened by *ordinary* employment stress, and that his physical illness brought about his disability. Corrections' conduct prior to termination of benefits in October 2000 could be interpreted as consistent with that theory. Therefore, we cannot say as a matter of law that a reasonable mind would believe that the employer meant to abandon the legal right to defend a claim (for mental illness based on *extraordinary and unusual* mental stress, predominately caused by the work stress) on the grounds that the employee's stress was not different than that suffered by other employees in a comparable work environment. Such a defense would be consistent with a position that ordinary work stress worsened a physical illness. We conclude the board did not err by refusing to bar a defense to a claim of work stress induced mental illness based on failure to prove qualifying stress.

c. The board's finding that Kelly was not prejudiced by the employer's conduct is supported by substantial evidence.

We also find there is substantial evidence in the record to support the board's finding that Kelly was not prejudiced by Corrections' voluntary payment of compensation, medical benefits, and vocational reemployment benefits. Kelly elected not to pursue a claim for permanent total disability compensation until well after his reemployment benefits plan was concluded. He was not prevented from pursuing his alternate theory by Corrections payment of temporary disability compensation. Kelly's assertion that he was unable to locate witnesses is not supported by evidence that, when he filed his claim, he attempted to find them and was unable to do so. It was also unsupported by any offer of proof – a description of the evidence the missing witnesses would have produced that could not be otherwise produced. The board found Kelly's testimony that he did not appeal his Public Employees' Retirement Board decision because he was receiving workers' compensation benefits disingenuous – that is, lacking candor. We interpret this to mean the board found his testimony was not

credible, and we are bound to respect the board's findings regarding the testimony of a witness who appears before the board.[75]

We conclude that the board's decision to reject Kelly's claim that Corrections' defense was barred by equitable estoppel or quasi-estoppel is supported by the board's proper application of the law and its findings of fact were based on substantial evidence in light of the whole record. We conclude the board did not err as a matter of law, or abuse its discretion, by permitting the employer to challenge the compensability of Kelly's claim for permanent total disability compensation for post-traumatic stress disorder.

3. The Public Employees' Retirement System decision was admissible as a public record.

Kelly objected to the admission of the decision of the Public Employees' Retirement Board at the hearing because it was not "evidence." Corrections stated it did not "intend to rely on the PERS decision."[76] It offered the decision because it provided context for a number of medical records and for the "effect that he did apply for PERS and he is not currently receiving those benefits."[77] The board stated it would consider it in so far as the board "could have taken administrative notice of" it.[78]

While the rules of evidence do not necessarily apply to board proceedings,[79] they provide a useful guide to whether a document is, or is not, objectionable evidence. The

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[75] AS 23.30.128(b).

[76] Hrg. Tr. 16:7.

[77] Hrg. Tr. 16:13-15.

[78] Hrg. Tr. 18:6-8.

[79] AS 23.30.135(a) states "In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter." 8 AAC 45.120(e) provides:

> Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on

copy of the decision is evidence of the Retirement Board's proceedings. It is evidence that proceedings regarding Kelly occurred before the Retirement Board, that the Retirement Board reached a decision, and the Retirement Board's decision text. Corrections was not offering the decision as evidence of the truth of the Retirement Board's findings, but for the purpose of explaining the context of some medical reports in the record and to establish that Kelly had appealed denial of occupational disability benefits to the Retirement Board. Therefore, because Corrections was not asking the board to accept the Retirement Board's factual findings, it is not hearsay. As evidence of an event, the Retirement Board's decision falls into the "public records" exception to the rule barring admission of hearsay evidence.[80]

We agree that the board correctly limited its use of the Retirement Board's decision to the scope of official notice of a public record of a decision of a public

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> which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

[80] Rule 803. Hearsay Exceptions-- Availability of Declarant Immaterial.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * *
>
> (8) Public Records and Reports. (a) To the extent not otherwise provided in (b) of this subdivision, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.

agency. We understand "administrative notice" to be something akin to "official notice" as defined by the Alaska Administrative Procedure Act[81] or "judicial notice" in Alaska Rule of Evidence 201.[82] The board properly declined to consider the factual findings of the Retirement Board as evidence of those facts. Instead, the board confined itself to those facts not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

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[81] AS 44.62.480 provides

> In reaching a decision official notice may be taken, either before or after submission of the case for decision, of a generally accepted technical or scientific matter within the agency's special field, and of a fact that is judicially noticed by the courts of the state. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to in the record, or appended to it. A party present at the hearing shall, upon request, be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency shall determine the manner of this refutation.

[82] Judicial Notice of Fact.

> (a) Scope of Rule. This rule governs only judicial notice of facts. Judicial notice of a fact as used in this rule means a court's on-the-record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.
>
> (b) General Rule. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> (c) When Discretionary. A court may take judicial notice as specified in subdivision (b), whether requested or not.
>
> (d) When Mandatory. Upon request of a party, the court shall take judicial notice of each matter specified in subdivision (b) if the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

questioned. We conclude the board did not err in admitting the decision for the limited purposes offered, or by taking official notice of the Retirement Board's decision.

4. *The board's decision denying the claim was supported by substantial evidence in light of the whole record*.

Kelly argues that the board's decision denying his claim does not rest on substantial evidence because Dr. Early's report was not properly interpreted by the board. He argues that the board's misunderstanding led the board to give his report less weight than Dr. Lipscomb's testimony and report. If the board had not erred in this way, Kelly reasons, the board must have decided his claim in his favor. We disagree.

First, the board's characterization of Dr. Early's opinion is a reasonable reading of his report and deposition testimony. Dr. Early clearly stated in his report that for an incident to produce sufficient stress to qualify for post-traumatic stress disorder, it must be subjectively experienced as life-threatening by the patient, and that he believed Kelly had experienced the described events as life-threatening. Dr. Lipscomb had reported that the incidents described to her were not sufficiently threatening to qualify Kelly's resulting symptom complex as post-traumatic stress disorder. In response, Dr. Early disagreed with Dr. Lipscomb that Kelly has met the qualification for diagnosis of post-traumatic stress disorder. In short, Dr. Early and Dr. Lipscomb disagreed about the basis for a particular diagnosis. Dr. Early did not say that, objectively viewed, the events Kelly described would cause extraordinary and unusual stress compared to the pressures and tensions experienced by other correctional officers in a similar facility.

Dr. Early's deposition testimony provides more support for the board's characterization of his analysis as "focused on whether the stress was discrete to the employee and greater than that which he would experience on a daily basis . . . on how the employee perceived the stress."[83] Dr. Early agreed that all correctional officers

[83] *Carl E. Kelly v. State of Alaska, Dep't of Corrections,* AWCB Dec. No. 06-0260 at 21.

"experience stress as a result of working in that environment, because there was always potential danger and often little immediate back up."[84] He added:

> We discussed that other correctional officers may have experienced threats to their lives or threats of harm. However, Mr. Kelly identified his experience as terrifying and psychologically traumatic to him and the cumulative psychological trauma associated with those repeated threats to his life suggest that his perception of the trauma was that it was in excess of what he would have anticipated as part of his job duties.[85]

The board could reasonably infer from this testimony that Dr. Early's opinion was based on how the employee subjectively perceived the stress of certain events, rather than the objective evaluation of whether the employee experienced stress that was extraordinary and unusual in comparison to that experienced by other correctional officers in the same or similar facilities.

Second, even if the board had erred in its evaluation of Dr. Early's testimony, it does not follow that the board must have accepted Dr. Early's opinion. There was sufficient evidence in the record to support the board's determination that Kelly did not experience extraordinary and unusual pressures and tensions in his employment. In particular, the board gave Sgt. Crowley's testimony "great weight" and found him to be a credible witness.[86] Crowley's testimony established that Kelly's perception that "the trauma was that it was in excess of what he would have anticipated as part of his job" was mistaken. The board's decision rested on its determination that Kelly's work [stress] conditions were not extraordinary and unusual in comparison to pressures and tensions experienced by individuals in comparable work environments. Our review of

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[84] Early Depo. 9:24-10:2.

[85] Early Depo. 10:14-21.

[86] AWCB Dec. No. 06-0260 at 21. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. AS 23.30.128(b).

the whole record reveals substantial evidence to support the board's finding. Therefore, we conclude we must uphold the board's decision.[87]

5. *The commission rejects the invitation to consider and adopt a rule of per se extraordinary and unusual stress for crime victims.*

Kelly argues that the commission should adopt a rule of "*per se* extraordinary and unusual stress" if the employee is the victim of a crime in his employment. He argues that because the prisoner's threat toward Kelly could be construed as assault in the fourth degree under AS 11.41.230, and the legislature has determined that such conduct is so extraordinary that it should be punishable, the victim of such conduct must be recognized as having been subjected to unusual stress as a matter of law.

The board is not authorized by the Alaska State Legislature to determine whether or not a crime has been committed; not even those established within the Workers' Compensation Act.[88] The superior court is granted original jurisdiction of all criminal matters.[89] While Kelly does not argue that the board has the power to convict, he does ask that the board determine that a person committed a crime. We believe that decision is not one the board may make. The board may find that certain factual events occurred in a case that appear to match the statutory elements of a crime, as when the board is presented with a work-place fight or an uninsured employer concealing property to avoid payment of compensation to an injured employee. For purposes of deciding a workers' compensation claim, the board may find that, for example, an employee took the employer's boat without permission, operated it while intoxicated, rounded the wrong side of a channel marker and rammed another boat, causing injuries. All of these findings may be related to a workers' compensation claim

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[87] AS 23.30.128(b): "The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record."

[88] See, AS 23.30.075(b); AS 23.30.095(i); AS 23.30.245; AS 23.30.250(a); AS 23.30.255; and AS 23.30.260.

[89] AS 22.10.020(a).

for the employee's injuries. However, the board may not decide that the employee committed the specific crime of, for example, vehicle theft in the first degree, in the absence of evidence of conviction of that crime by a competent court.

In any case, it appears the board was not asked to determine if Kelly was the victim of a crime. Kelly did not raise his theory of compensation liability based on being a crime victim to the board in the hearing or his hearing briefs. No evidence was presented to the board that anyone, inmate or otherwise, was convicted in the courts of a criminal assault against Kelly in the course of Kelly's employment.

The commission has jurisdiction to review orders and decisions of the board and to determine issues of law arising under the Workers' Compensation Act in those "matters appealed" to the commission.[90] To be appealed, the matter must have been presented first to the board. The commission will not issue general advisory opinions based on hypothetical circumstances. Therefore, we decline to consider and adopt the rule now urged by Kelly on appeal.

Conclusion.

The board's findings are supported by substantial evidence in light of the whole record. The commission concludes the board did not abuse its discretion in its procedural rulings and did not err in the application of the law. We AFFIRM the board's decision denying the appellant's claim for permanent total disability compensation and benefits related to a mental illness caused by mental stress in appellant's employment.

Date: *July 13, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[90] AS 23.30.008(a), 128(a).

APPEAL PROCEDURES

This is a final agency decision. The commission has affirmed (upheld) the board's decision dismissing the workers' compensation claim. It becomes effective when filed in the office of the commission unless proceedings to appeal it are instituted. Look at the Certification below to find the date this decision was filed in the commission. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

RECONSIDERATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of AWCAC Decision No. 049 in the matter of *Carl E. Kelly v. State of Alaska, Department of Corrections*; AWCAC Appeal No. 06-030; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *13th* day of July, 2007.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on 7/13/07 a copy of the above Final Decision in AWCAC Appeal No. 06-030 was mailed to Kalamarides & Cooper and a copy was faxed to Kalamarides, Cooper, AWCB Appeals Clerk, and Director WCD.

Signed
L. A. Beard, Deputy Clerk