Alaska Workers' Compensation Appeals Commission

Kennecott Greens Creek Mining Co. and Sedgewick Claims Management Services, Inc.,
Appellants, Cross-Appellees,

vs.

Raymond Clark and State of Alaska, Second Injury Fund,
Appellees, Cross-Appellants.

Final Decision
Decision No. 080 June 9, 2008

AWCAC Appeal No. 07-015
AWCB Decision No. 07-0077
AWCB Case No. 200404678

Appeal and cross-appeal from Alaska Workers' Compensation Board Decision No. 07-0077, issued at Juneau on April 5, 2007, by southeast panel members Krista Schwarting, Chair, Richard Behrends, Member for Industry, and Damian J. Thomas, Member for Labor.[1]

Appearances: Paul M. Hoffman, Robertson, Monagle & Eastaugh, P.C., for appellants and cross-appellees Kennecott Greens Creek Mining Company and Sedgewick Claims Management Services, Inc. Talis J. Colberg, Attorney General, and Larry A. McKinstry, Assistant Attorney General, for appellee and cross-appellant State of Alaska, Second Injury Fund. Thomas G. Batchelor, Batchelor & Associates, for cross-appellant and appellee Raymond Clark.

Commission proceedings: Oral argument on appeal presented March 11, 2008.

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

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

By: Kristin Knudsen, Chair.

1. Introduction.

This complex appeal arises from the board's denial of a petition for reimbursement of reemployment compensation by Raymond Clark's employer, Kennecott Greens Creek Mining Co. The appellant asserts the board erred in concluding

[1] Member for Labor Damian J. Thomas, a member of the northern panel, sitting by assignment for the southeast panel. AS 23.30.005(e).

that Second Injury Fund reimbursement under AS 23.30.205 is not available for compensation paid under AS 23.30.041(k). The appellant also challenges the board's failure to award attorney fees against the Second Injury Fund. The Fund disagrees, and asserts on cross-appeal that the board erred in finding Clark suffered a qualifying second injury, and in failing to determine if Clark's disability was substantially greater as a result of the second injury as required by AS 23.30.205, before concluding the Fund was liable for future reimbursement. The Fund argues that the board lacks authority to award attorney fees against the Fund. The appellee, Raymond Clark, cross-appeals, asserting that the board erred in failing to award him attorney fees against the Fund.

The parties' assertions require the commission to decide if the board had substantial evidence, and used the correct legal analysis, to determine that the employer satisfied the requirements for reimbursement under AS 23.30.205. The commission must decide if AS 23.30.205 requires reimbursement of benefits paid under AS 23.30.041(k). The parties' assertions also require the commission to decide if the board may award attorney fees against the Second Injury Fund.

The board failed to distinguish an employee claim for compensation for a second injury from Clark's employer's petition for Second Injury Fund reimbursement. The commission determines that the board failed to make a required finding of fact that the second injury resulted, or did not result, in "substantially greater" disability than would have resulted from the first injury alone. The commission concludes that reimbursement of compensation under AS 23.30.205 includes compensation paid pursuant to AS 23.30.041(k), but that liability for reimbursement is not triggered until 104 weeks of disability compensation has been paid. The commission concludes that attorney fees may not be awarded against the Second Injury Fund under AS 23.30.145, but that fees may be awarded to, or against, the Fund under AS 23.30.008. Therefore, the board's decision is reversed in part, affirmed in part, and remanded for further proceedings.

2. Factual background.

Raymond Clark began working as a truck driver for Kennecott Greens Creek Mining Company (Kennecott) in December 2000. In August 2001, he changed to a

position as an underground mechanic. About the same time, Clark began to have back pain, but he continued to work, with occasional absences for back pain, until July 2002. Then he underwent surgery by Dr. Leung in Seattle for a central herniation of the L4-5 disk. Clark's physicians expressed concerns about a return to work in the same occupation, and Dr. Leung recommended retraining. Clark was found eligible for reemployment benefits. But, after obtaining a release to return to his former work with a 50-pound lifting restriction, Clark waived reemployment benefits, and was paid his permanent partial disability compensation based on an impairment rating of 17 percent. Clark returned to work as an underground mechanic in March 2003.

In March 2004, Clark went to the emergency room with complaints of severe back pain. Dr. Leung removed the plates from the first surgery, but Clark continued to suffer increased pain and was referred to the Virginia Mason Pain Clinic. In April 2005, Clark was released to light-duty work. Clark was found eligible for reemployment benefits and began retraining as a process control operator in 2005. This plan was interrupted temporarily when Clark underwent surgery to implant a pain pump. Clark received an increased rating to 20 percent permanent partial impairment.

Following his first injury, Kennecott paid Clark temporary total disability compensation at $768 per week for 42 weeks and five days. It also paid him $30,090 of permanent partial disability compensation; if paid at $768 per week, this amount would be sufficient for 39 weeks of compensation. After Clark's second injury, Kennecott paid Clark 49 weeks and six days of temporary total disability compensation at $832 per week, beginning March 8, 2004.[2] It paid an additional period of permanent partial impairment compensation of $5,310, equivalent to six weeks and two and one-

[2] Initially, Kennecott paid Clark 29 weeks of temporary total disability compensation. On Sept. 28, 2004, Kennecott began paying reemployment benefits under AS 23.30.041(k) (known as "§ .041(k) benefits"). R. 0007. Kennecott re-characterized the compensation from Sept. 28, 2004 to Feb. 18, 2005, as permanent partial disability compensation in May 2006. R. 0011. The next month Kennecott reported the same compensation as temporary total disability compensation and payment to Clark of a 25 percent penalty for late payment of the difference between the "§ .041(k) benefit" rate and the higher temporary total disability rate. R. 0013-14.

half days. Thereafter, it paid Clark benefits under AS 23.30.041(k), with an additional eight weeks period of temporary total disability compensation in 2005. Clark continues to participate in his retraining plan and receives compensation paid under AS 23.30.041(k).

3. Proceedings before the board.

Kennecott filed a report of a March 25, 2004 injury on April 5, 2004.[3] The report was not signed by Clark. On July 7, 2004, Kennecott gave notice of a possible claim against the Second Injury Fund, citing the prospect of more surgery.[4] Kennecott's adjuster requested that Clark be evaluated to determine if he was eligible for reemployment benefits, August 2004.[5] Clark was found eligible on October 25, 2004[6] and he elected to receive benefits and develop a retraining plan.[7] There is no record that Clark filed a claim for workers' compensation; his employer paid compensation without an award.[8]

On March 23, 2006, Kennecott petitioned for reimbursement from the Second Injury Fund.[9] The Fund answered, conceding that the employer had written knowledge of a qualifying condition before March 25, 2004, but denying that 104 weeks of compensation had been paid and asserting it had insufficient information to admit that a qualifying second injury had occurred.[10] The Fund took the position that no subsequent injury had combined with a pre-existing condition to result in a greater

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3 R. 0001.

4 R. 0004.

5 R. 0993.

6 R. 1025-27.

7 R. 1029.

8 AS 23.30.155(a) provides that "Compensation . . . shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer."

9 R. 0021-22.

10 R. 0024-25.

disability, but that Clark merely exacerbated his prior injury.[11] Kennecott filed a timely request for hearing.[12] Kennecott's petition was heard March 13, 2007.

a. Arguments presented to the board.

Kennecott argued that Clark suffered a second injury in the form of aggravation of a pre-existing condition, which resulted from the cumulative trauma of his work, and that the second injury resulted in a substantial increase in Clark's disability. Kennecott argued that benefits paid under AS 23.30.041(k) were compensation, distinguishing Raris v. Greek Corner,[13] and Providence Washington Ins. Co. v. Busby.[14]

Clark joined in Kennecott's position. He pointed out that the 2004 injury resulted in a higher rate of compensation and entitlement to reemployment benefits; if no injury occurred, his compensation rate would be lower and he would not be entitled to reemployment benefits waived in the first injury. Clark argued that the purpose of the Second Injury Fund, to provide incentives to employers to hire injured workers, is not served by limiting reimbursement to forms of compensation in the statute at the time the Fund was enacted. He argued that the legislature's 2000 amendment of AS 23.30.041(k) from "wages" to "compensation" is consistent with the definition of compensation in AS 23.30.395(12),[15] and that AS 23.30.205 requires reimbursement of "all compensation payable." He pointed out that *Alaska Pacific Ins. Co. v. Julian*,[16] was decided in 1973, before section .041(k) was enacted, when temporary total disability compensation was paid through the vocational rehabilitation process. Julian, he argued, concerned the construction of AS 23.30.191, now repealed. Clark argued that the presumption against implied repeal of statutory provisions precluded the interpretation argued by the Fund. Finally, Clark argued it would be inequitable not to

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[11] R. 0183.

[12] R. 0178.

[13] 911 P.2d 510 (Alaska 1996).

[14] 721 P.2d 1151 (Alaska 1986).

[15] AS 23.30.395 (12) defines "compensation" as "the money allowance payable to an employee . . . as provided for in this chapter."

[16] 513 P.3d 1097 (Alaska 1973).

award attorney fees against the Fund, which had threatened Clark's benefits by asserting no second injury occurred.

The Second Injury Fund argued that Clark did not suffer a second injury, but that his 2004 "injury" was essentially a progression of the effects of medical treatment for the 2001 injury. The Fund argued that no cause of Clark's increased pain had been identified. If there was a second injury, there is no evidence that it combined with the first to produce substantially greater disability than either would have done alone. The Fund also argued that Kennecott had not paid sufficient weeks of disability compensation to qualify for reimbursement. Payments made under AS 23.30.041(k) were not compensation subject to assessment to the Fund under AS 23.30.040(b), therefore, the Fund argued, they were not compensation that could be reimbursed under AS 23.30.205(b). Finally, the Fund argued that the board could not order the Fund to pay attorney fees under AS 23.30.145 because the employee, Clark, was not the claimant.

b. The board's decision.

The board applied the standard presumption analysis to determine if the employee suffered a second injury.[17] The board found the employee "certainly raised the presumption of compensability."[18] The board specifically found that the employee's testimony was credible "because he will continue to receive benefits regardless of whether or not the employer prevails against the SIF."[19] The board then determined that the employer had not rebutted the presumption of compensability.[20] The board then found that the two injuries had combined:

> As the medical records and the employee's testimony support the existence of a second injury in March 2004, the question then becomes whether the second injury combined with the first

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[17] *Raymond Clark, Jr. v. Kennecott Greens Creek Mining Co.,* Alaska Workers' Comp. Bd. Dec. No. 07-0077, 5-6 (Apr. 5, 2007) (Behrends & Thomas; Schwarting concurring).

[18] *Raymond Clark, Jr.*, Bd. Dec. No. 07-0077 at 7.

[19] *Id.*

[20] *Id.*

> to create the employee's disability. Prior to March 2004, the employee had a 17% PPI rating and was able to return to his usual and customary work with the employer. Subsequent to March 2004, the employee had a 20% PPI rating and could no longer perform heavy work. For these reasons, the Board concludes that the first injury combined with the second to create an injury compensable under the SIF statute.[21]

The board concluded, however, that the Second Injury Fund was "meant to be a payer in only limited circumstances."[22] The board determined that there was "the clear mandate" in *Busby,*[23] and that the Supreme Court has "explicitly decided that benefits paid under AS 23.30.041(k) do not constitute 'compensation' within the meaning of the SIF statute."[24] It also noted a likelihood that if employers draw on the Fund for reimbursement for section .041(k) payments without contributing based on such payments, the Fund would be exhausted.[25] The board concluded that the Fund was not liable for reimbursement of section .041(k) payments.[26] The board found that the employer had not paid 104 weeks of qualifying compensation, so it denied the petition for reimbursement.[27]

The board decided that "as a general principle, the SIF may be liable for attorney fees."[28] However, because the employer had not prevailed, the board found an award

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[21] *Raymond Clark, Jr.*, Bd. Dec. No. 07-0077 at 8.

[22] *Id.* at 9, (citing *Employers Commercial Union Ins. Gp. v. Christ*, 513 P.2d 1090, 1093 (Alaska 1973) (stating that the SIF was meant to be limited and "simply applied according to its terms . . .")).

[23] *Raymond Clark, Jr.*, Bd. Dec. No. 07-0077 at 10 n.40.

[24] *Id.* at 10.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Raymond Clark, Jr.*, Bd. Dec. No. 07-0077 at 11.

of fees was not warranted.[29] It denied the "employer and employee's claims for attorney fees and costs."[30]

Kennecott filed a timely appeal. The Second Injury Fund and Clark cross-appealed.

4. Standard of Review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the board's findings.[31] The commission does not consider evidence that was not in the board record when the board's decision was made.[32] A board determination of credibility of a witness who appears before the board may not be disturbed by the commission.[33]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[34] 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.[35] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation[36] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[37]

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29 *Id*.

30 *Id.*

31 AS 23.30.128(b).

32 AS 23.30.128(a).

33 AS 23.30.128(b).

34 AS 23.30.128(b).

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

36 AS 23.30.007, 008(a). *See also Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

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

5. Discussion.

a. Does the presumption of compensability apply to an employer's petition for reimbursement from the Second Injury Fund?

The first issue raised in this appeal[38] is whether the board applied the proper legal analysis to Kennecott's petition and had sufficient evidence to support its findings of fact. The board's decision that a second injury occurred rests on the determination that the employer failed to rebut the presumption of compensability found at AS 23.30.120(a)(1), which provides:

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter.

There is no record of a claim based on a 2004 injury filed by the employee, Raymond Clark, before the hearing. Although Clark made a verbal claim at hearing for attorney fees based on "the entire period,"[39] he had not filed a written claim for fees. The issue of attorney fees was limited by the hearing officer to "fees relating to the issues before us today."[40] The parties agreed to consolidate the two cases at the hearing,[41] but there was no agreement to hear a claim for compensation. We conclude there was no "proceeding for the enforcement of a claim for compensation" before the board.

Thus, while the board decision properly recites the presumption analysis that applies in determining whether an employer is liable for an employee's claim for compensation, that analysis does not address whether the Second Injury Fund is liable for reimbursement to the employer. The presumption of compensability aids the

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[38] The commission discusses the issues presented in this appeal in order of asserted error instead of the order of presentation in the appeal.

[39] Tr. 8:18-19. Clark also had a workers' compensation case based on the 2001 injury, AWCB Case No. 200127519, in which he filed a written claim on Oct. 24, 2002. R. 1204-5. No request for hearing was filed on that claim. The issues before the board concerned only the petition for reimbursement. R. 0990.

[40] Tr. 10:25-11:1.

[41] Tr. 7:22-23.

employee by establishing a prima facie case for compensation liability; in the usual case, it shifts the burden of producing evidence to the employer,[42] who must rebut the employee's prima facie case with substantial evidence that eliminates the reasonable possibility that the disability is work-related, or affirmatively shows that an alternate cause of disability that, if believed, would eliminate the possibility of work-relationship.

The board's application of this analysis to the employer's case for reimbursement from the Second Injury Fund resulted in the incongruity that the board concluded the employer established the first element of its case against the Fund by not producing evidence. The board effectively shifted the burden to produce evidence disproving the case against the Fund to the employer (who sought to prove the case), instead of the Fund (which opposed the case), and then failed to consider whether the Fund had produced evidence to rebut a presumption that the employee was disabled due to a second work-related injury.[43] The board found that a second injury occurred based on Kennecott's lack of evidence rebutting a "pro-worker presumption" applicable to the employee's claims, without recognizing that Kennecott was using the presumption in its case against the Second Injury Fund.

The board's presumption analysis was flawed in execution as well as application. The board correctly recited that, in determining whether the presumption is overcome,

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[42] The presumption of compensability shifts the burden of producing evidence, but not the burden of proof. *Sokolowski v. Best Western Golden Lion Hotel,* 813 P.2d 286, 292 n.7 (Alaska 1991) (citing *Wien Air Alaska v. Kramer,* 807 P.2d 471, 474 n.4 (Alaska 1991)).

[43] In this case, the employer sought to prove that a second injury occurred. AS 23.30.205(e) provides that the Fund "may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party." This provision recognizes that the Fund's interests are adverse to those of the employer and, sometimes, the employee. The board's analysis failed to recognize that in this case both the employee's interests (in an increased compensation rate and access to reemployment benefits) and the employer's interests (in obtaining reimbursement) were united against the Fund.

the evidence to rebut the presumption is examined alone,[44] and the board "defers questions of credibility . . . until after it has decided whether the employer has produced a sufficient quantum of evidence to rebut the presumption."[45] However, the board then determined that the employer had not rebutted the presumption based on an express finding that the employee's testimony was credible:

> [Clark] testified that his pain was more severe, and at different places in his spine than prior to March 2004. The Board finds the employee's testimony credible, and grants it great weight. The Board particularly finds the employee credible because he will continue to receive benefits regardless of whether or not the employer prevails against the SIF—therefore, the employee has no motivation to be less than candid with this tribunal. We therefore conclude that the employer has not rebutted the presumption of compensability, and that the employee experienced a second, compensable injury in March 2004.[46]

Instead of determining credibility *after* deciding if the employer had rebutted the presumption, the board found the employee credible, gave his testimony great weight, and *then* found, based on Clark's testimony, that the employer had not rebutted the presumption. The board based its decision that the presumption was not overcome on the credibility of the employee, and did not examine the evidence in isolation.

Setting aside the employee's testimony, the record contains sufficient evidence in Dr. Leung's testimony to attach the presumption that Clark suffered an injury related to his employment after March 26, 2003.[47] Dr. Leung testified that the anticipated

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[44] *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985) ("The presumption of compensability shifts the burden of production to the employer once the employee has established a preliminary link. Since the presumption shifts only the burden of production and not the burden of persuasion, the evidence tending to rebut the presumption should be examined by itself. The court does not weigh the evidence tending to establish causation against the rebuttal evidence in deciding whether the employer has produced substantial evidence to rebut the presumption of compensability.").

[45] *Raymond Clark, Jr.,* Bd. Dec. No. 07-0077 at 6 (citing *Norcon, Inc. v. Alaska Workers' Comp. Bd.,* 880 P.2d 1051 (Alaska 1994)).

[46] *Raymond Clark, Jr.,* Bd. Dec. No. 07-0077 at 7.

[47] Leung Dep. (Oct. 4, 2006) 43:15-45:17.

degeneration associated with Clark's prior surgery was "expedited" by the employment. The fact that Dr. Leung was unable to pinpoint a particular traumatic event does not eliminate a possibility of cumulative injury in which the pre-existing condition is accelerated by the employment.

The Second Injury Fund did not identify in its brief on appeal any evidence in the record that would eliminate the reasonable possibility that Clark's pre-existing condition was accelerated by his employment conditions after March 26, 2003. The Fund did not present evidence of an alternate cause that, if believed, would eliminate the possibility of work-related acceleration. The Fund points to the absence of evidence of a specific injurious event, and evidence that Clark had back pain from August 8, 2001 through March 14, 2005,[48] but this evidence does not eliminate the possibility of *some* work-related acceleration. Because the Fund did not establish on appeal that the board could have concluded that the Fund had overcome the presumption of compensability, the board's error on this point does not require reversal.

However, the effect of the board's analysis was to create a presumption of reimbursement, and this is not harmless error. While the Supreme Court has held that the presumption of compensability is properly applied to a dispute as to which of two or more employers are liable to the employee for compensation, or which of successive insurers are liable, the Court has not held that there is a presumption in favor of the employer's request for Second Injury Fund reimbursement.[49] There are strong policy

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[48] Br. of Cross-appellant Second Injury Fund, 19.

[49] *Compare Alaska Pulp Corp. v. United Paperworkers Int'l Union,* 791 P.2d 1008, 1011 (Alaska 1990) (declining to apply presumption to dispute between purported employers), *with Cluff v. NANA-Marriott,* 892 P.2d 164, 170 (Alaska 1995) (holding presumption applied to existence of employment relationship between employee and the employer she asserts was her employer, but not to other possible employers), *and Wells v. Swalling Constr. Co., Inc.,* 944 P.2d 34, 36 (Alaska 1997) (noting board found *employee* Wells rebutted presumption raised by *employer* that last injury was cause of disability). Although Clark's position was that his disability was due to the 2004 injury, the last injurious exposure rule does not apply to successive injuries with the same employer and insurer, as here. *Wells,* 944 P.2d at 37. Thus, merely establishing that Clark suffered a second injury in his employment is not sufficient to

reasons why there should be no presumption of reimbursement. The employer or insurer has the early information and discretion to defend a claim for compensation made against it or to pay a claim and seek reimbursement, but the Fund does not have that discretion, nor the same early sources of information. A presumption in favor of reimbursement would encourage more requests for reimbursement. The Fund's limited resources must be preserved for reimbursement payments;[50] the expansion of liability that would accompany a presumption of reimbursement would challenge the Fund's ability to satisfy its liabilities to employers. The commission concludes that the presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not extend to an employer's request for reimbursement from the Second Injury Fund.

b. Did the board make adequate findings of fact to support a conclusion that the Second Injury Fund is liable for reimbursement?

In order to decide that the Fund is liable for reimbursement to an employer, AS 23.30.205(a)[51] requires that the following facts be established: (1) the employee

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assign liability for all subsequent disability to the last employment injury where both injuries are "a substantial factor" in bringing about the disability.

[50] AS 23.30.040(h) provides that administrative expenses of the state for the Second Injury Fund must be paid from the fund.

[51] AS 23.30.205 provides in pertinent part:

> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.
> (b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical

had “a permanent physical impairment” within the meaning of AS 23.30.205(c); (2) the employee incurred “a subsequent disability by injury arising out of and in the course of the employment;” and (3), the employer’s liability for compensation for disability is substantially greater

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> impairment, the employer or the insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 104 weeks.
> (c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge.
> (d) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a “permanent physical impairment” unless
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> (1) it is one of the following conditions:
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> (A) epilepsy,
> (B) diabetes, . . .
> * * *
> (Z) ruptured intervertebral disk,
> (AA) spondylolisthesis; or
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> (2) it would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims.
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> (e) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.
> (f) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier have knowledge of the injury or death.

(a) "by reason of the combined effects of the preexisting impairment and subsequent injury" or,

(b) "by reason of the aggravation of the preexisting impairment"

than the liability that would have resulted from the subsequent injury alone.

In order to make the findings required by (3) above, the board must establish the value of the employer's liability for compensation for disability from the subsequent injury alone and the value of the liability for compensation for disability from the "combined effects" of the injury and preexisting impairment or "aggravation" of the preexisting impairment. Once both values are established, the board may compare them and determine if the employer's liability is "substantially greater" than would result from the second (or subsequent) injury alone. It is not enough that the liability be simply greater, it must be *substantially* greater.

Whether or not the employer's liability is substantially greater is a fact, not a conclusion. The board must make that finding before a conclusion may be reached that the second injury resulted in Fund liability for reimbursement.[52]

The board's decision shows that the board found that there was a second injury. The board found that the two injuries "combined" *because* Clark's permanent impairment increased from 17 percent to 20 percent, and he lost his ability to engage in "heavy work." The board then *concluded* that Clark had "an injury compensable under the SIF statute." However, the board did not compare what Kennecott's liability for compensation for disability would have been had Clark not had the first injury and the board did not determine that the combined effects of the two injuries resulted in "substantially greater" employer liability for compensation for disability. The board made the findings that Clark incurred "a subsequent disability by injury arising out of and in the course of the employment;" but, the board failed to make findings required

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[52] In addition to establishing the facts required by AS 23.30.205(a), AS 23.30.205(c) requires an employer to establish by written records that it had knowledge of a qualifying permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge. The Fund did not contest Kennecott's satisfaction of AS 23.30.205(c) requirements.

to support a conclusion that Kennecott had a liability that may be reimbursed under AS 23.30.205(a).

There is evidence in the record on which reasonable minds could differ as to the substantiality of the difference in the employer's liability. For that reason, the commission remands the case to the board with instructions to make additional findings of fact. The employer has the burden to produce evidence sufficient to demonstrate the relative values of the employer's liability for compensation for disability, and, the substantiality of any greater liability. Without applying a presumption that a second injury is reimbursable, the board must determine whether Kennecott's liability to Clark for compensation for disability is substantially greater as a result of the "combined effects" of the injury and preexisting impairment, or "aggravation" of the preexisting impairment, than Kennecott's liability would have been as a result of the second injury alone. If Kennecott fails to persuade the board by a preponderance of the evidence of the existence of that fact, the Fund cannot be held liable.

c. Is compensation owed under AS 23.30.041(k) included in the Second Injury Fund's liability for reimbursement of "all compensation" under AS 23.30.205(a)?

AS 23.30.205(a) provides:

> If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

When Clark was injured in 2004, AS 23.30.041(k) provided:

> Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever

> date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

When Clark was injured in 2004, AS 23.30.395(8) defined compensation as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter."

The Second Injury Fund argues that reimbursement "for all compensation payments" in AS 23.30.205(a) does not include "compensation equal to 70 percent of the employee's spendable weekly wages" in AS 23.30.041(k) because the statute establishing the Fund, AS 23.30.040, does not include compensation paid under AS 23.30.041(k) as a source of contribution to the fund. The board relied on *Providence Washington Ins. Co. v. Busby,* quoting the Supreme Court's statement that it was "persuaded that this language [the 'disability' language in AS 23.30.205(a)] is indicative

of a legislative intent to establish the fund as a limited reimbursement scheme for disability payments *only.*"[53] The board's decision states that the Supreme Court "has explicitly decided that benefits paid under AS 23.30.041(k) do not constitute 'compensation' within the meaning of the SIF statute."[54] "The Court's logic," the board states, "is inescapable: if an employer is not required to pay into the SIF for reemployment benefits, they [sic] should not be permitted to draw reimbursement for those benefits from the SIF."[55]

The board's understanding of *Busby* is mistaken. In *Busby,* the question before the Court was whether "compensation" should be interpreted broadly to include payments for medical benefits and attorney fees.[56] Based on the use of

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[53] 721 P.2d 1151, 1152 (Alaska 1985) (emphasis in original).

[54] *Raymond Clark, Jr.,* Bd. Dec. 07-0077 at 10.

[55] *Id.,* noting the "clear mandate" in *Providence Washington Ins. Co. v. Busby,* 721 P.2d 1151 (Alaska 1986).

[56] The Court noted that in *Williams v. Safeway Stores*, 525 P.2d 1087, 1089 n.6 (Alaska 1974), Justice Boochever had commented on the "difficulty of defining 'compensation' within AS 23.30.130 [modification of orders] and the chapter as a whole." *Busby,* 721 P.2d at 1152. The first paragraph of Justice Boochever's note in *Williams* makes it clear his difficulty defining compensation was focused on other benefits than those that might meet the Act's definition of compensation:

> Although we need not dispose of the issue, we deem it appropriate to summarize the difficulties in determining whether 'compensation' in AS 23.30.130(a) includes medical payments. We do so because we believe the issue is peculiarly ripe for legislative resolution. Initially, AS 23.30.265(8) defines 'compensation' for the purposes of the Act without mention of medical benefits, and subpart (16) defines 'medical and related benefits' in mutually exclusive language, thus apparently foreclosing arguments like that raised by Williams. However, other sections of the Act. AS 23.30.045(a) and 23.30.010 being the foremost examples, use the word 'compensation' so that the only reasonable reading of the word would include medical benefits.

Williams, 525 P.2d at 1089 n.6.

"compensation" in section 205, the Court held that reimbursement was limited to compensation for disability.[57]

However, in 1985, when *Busby* was decided, AS 23.30.041(k) did not exist in its present form. Instead, AS 23.30.041(g) provided that "temporary disability under AS 23.30.185 [temporary total disability] or AS 23.30.200 [temporary partial disability] shall be paid throughout the rehabilitation process." In addition, the board could award "an employee being rehabilitated under this section an additional $200 a month if it finds that a case of extreme financial hardship exists." The Court had held previously that an employee whose unscheduled injury was medically stable, but who was pursuing an approved vocational rehabilitation program, was entitled to temporary total disability compensation.[58] Thus, the Court's holding that reimbursement was limited to "compensation for disability only" did not preclude reimbursement of compensation the employer paid *because* an employee was engaged in a vocational rehabilitation plan, even if the employee was medically stable.

In a case decided before AS 23.30.041 was enacted, the Supreme Court held that AS 23.30.045(a) required an employer to pay "compensation payable under . . . 23.30.180-23.30.215," including "compensation for maintenance" payable under AS 23.30.191, which then provided:

> An employee, who, as a result of injury, is or may be expected to be totally or partially incapacitated for his normal occupation and who, under the direction of the Department of Labor, is being rehabilitated to engage in remunerative occupation and who is not entitled to further temporary total disability or temporary partial disability compensation, in addition to the amount allowed under § 40 of this chapter for maintenance, may receive additional compensation necessary for his rehabilitation,

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[57] Later, in *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991), "compensation" was interpreted to include attorney fees, and in *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, (Alaska 1993), it was interpreted to include medical benefits.

[58] *Bignell v. Wise Mechanical Contractors*, 651 P.2d 1163 (Alaska 1982).

> not more than one-half of the compensation allowed under § 185 of this chapter.[59]

Responding to the employer's argument that the Fund should be liable to pay the "additional compensation" under AS 23.30.191 because it was provided for the purpose of rehabilitation, the Court said, "Only payments made pursuant to AS 23.30.040 are the responsibility of the second injury fund. We think that appellants attempt to derive too much from the bare fact that AS 23.30.040(e) and AS 23.30.191 provide for similar compensation."[60] The Court's comment in *Julian* suggests that the *purpose* of the compensation is not determinative of its inclusion or exclusion from compensation that is paid by, or conversely, reimbursed by, the Fund.

In 1988, the legislature established a new regime for workers' compensation vocational rehabilitation, repealing and reenacting AS 23.30.041, and providing in AS 23.30.041(k) that

> Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. *If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide wages equal to 60 percent of the employee's spendable weekly wages but not to exceed $525, until the completion or termination of the plan.* A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum.[61]

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[59] AS 23.30.191, *repealed* § 27 ch. 93 SLA 1982. AS 23.30.040(e), repealed § 27 ch. 93 SLA 1982, previously provided that a person being "retrained or rehabilitated shall receive compensation from the second injury fund for maintenance, in the sum which the board considers necessary, during the period of retraining and rehabilitation, not exceeding $100 a month."

[60] *Alaska Pac. Assur. Co. v. Julian*, 513 P.2d 1097, 1098 (Alaska 1973).

[61] § 10 ch. 79 SLA 1988. (Emphasis added).

The legislature used the term "wages," not "compensation," to refer to payments made after exhaustion of permanent partial impairment benefits before termination of a reemployment plan. Thus, while AS 23.30.045(a) continued to provide that an employer was liable for "compensation payable under AS 23.30.041," until 2000, the money paid was "wages," not compensation. The plain language of the statute excluded section 041(k) wages, because only compensation may be reimbursed.

In 2000, the legislature amended the third sentence of §041(k) to read:

> If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide *compensation* equal to *70* percent of the employee's spendable weekly wages, but not to exceed *105 percent of the average weekly wage*, until the completion or termination of the plan, *except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate*.[62]

In explaining the impact of the changes, presented in HB 417, Division Director Paul Grossi focused on the increase in the payment amount:

> If that [permanent partial impairment compensation] is used, then the "stipend" would kick in and be paid until the end of the retraining process; under present law, that is 60 percent of the spendable weekly wage, and under the new law, it would be 70 percent. Therefore, there could be some additional stipend money as well.[63]

No evidence of legislative intent was presented by the Fund that the legislature's substitution of the word "compensation" for "wages" was not intended to subject such payments to reimbursement by the Second Injury Fund. The legislature could have resurrected the term "compensation for maintenance" from repealed AS 23.30.191 had it wished to explicitly differentiate compensation paid under AS 23.30.041(k) from

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[62] § 4 ch. 105 SLA 2000 (emphasis added to highlight changes).

[63] *Workers' Compensation: Hearing on HB419 before the House Judiciary Committee*, 21st Legis. 2215 (April 3, 2000) (statement of Paul Grossi, Dir., Div. of Workers' Comp.).

"compensation for disability;" for, in a general sense, all compensation is paid for the disability or death of an employee.[64] The legislature did not act to distinguish compensation paid upon exhaustion of temporary total disability or permanent partial impairment compensation from "all compensation."

The commission assumes the legislature has available other provisions of the Alaska Workers' Compensation Act when it amends a provision of the Act.[65] The rule is that statutes that are *in pari materia* be construed together.[66] "Statutes are deemed to be *in pari materia* when they relate to the same purpose or thing or have the same purpose or object."[67] Strictly speaking, the Second Injury Fund does not have the same immediate object as reemployment benefits; but both parts of the Act are united in the general purpose of supporting the return of injured workers to active employment. While sharing a general purpose is not determinative, it is a consideration that AS 23.30.040, .041, and .205 should not be read inconsistently.

The argument that the reference to "compensation liability for disability" in the first phrase of section 205(a) limits reimbursement to compensation for forms of disability in the last clause is not persuasive. The employer's prerequisite liability is not limited to specific types of compensation ("the employer . . . shall in the first instance pay *all awards of compensation* provided by this chapter"). An implied limitation on the type of compensation reimbursed cannot be read into the same words ("all

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[64] See AS 23.30.010; .015(a); and .110(a); *see also* AS 23.30.155(f) (referring to "additional amount . . . paid at the same time as, but in addition to, the compensation" rather than "additional compensation"); *but see* AS 23.30.190 (compensation for permanent partial *impairment*, not disability).

[65] 2B N. Singer, *Sutherland Statutory Construction*, § 51.01 (6th ed. 2000).

[66] *Underwater Constr., Inc. v. Shirley*, 884 P.2d 150, 155 (Alaska 1994).

[67] *State v. Eluska*, 724 P.2d 514, 517 (Alaska 1986) (Compton, J., dissenting); 2B N. Singer, *Sutherland Statutory Construction*, § 51.02 (6th ed. 2000); *but see State v. Bundrant,* 546 P.2d 530, 545 (Alaska 1976) ("a statute in pari materia with a *subsequent*, *but approximately contemporaneous*, measure is a proper source of evidence of legislative intent in the second measure") (emphasis added); *Kirby v. Alaska Treatment Center*, 821 P.2d 127, 130 (Alaska 1991) (construing subsequent amendment to AS 23.30.041 *in pari materia* with repealed AS 23.30.265(38)).

compensation") in the immediately following phrase ("but the employer . . .shall be reimbursed from the second injury fund of *all compensation payments* subsequent to those payable for the first 104 weeks of disability"), based only on the description of the waiting period ("the first 104 weeks of disability").

The argument that the last phrase "*compensation* payments subsequent to those *payable for* the first 104 weeks of *disability*" limits the reimbursement to only compensation payable for disability is not consistent with reimbursement of compensation for permanent partial impairment under AS 23.30.190. Compensation payable under AS 23.30.190 is neither calculated by "weeks of disability" nor always payable in weekly installments. Moreover, interpreting compensation, as argued by the Fund, to that "*payable for* . . . *disability*" would render AS 23.30.040(b)'s requirement that the employer pay a contribution to the Fund based on payment for "permanent partial *disability*," instead of permanent partial impairment, a nullity because AS 23.30.190 no longer refers to "disability". The Fund cannot argue that "disability" is a specific word denoting a specific form of compensation, or "money allowance payable to an employee," in one part of its statutes, but not in another.

Therefore, the commission holds that "all compensation" in AS 23.30.205(a) includes "compensation" paid under AS 23.30.041(k).[68] The commission acknowledges the force of the Fund's argument that it will be challenged by increased costs; however, the Fund paid reimbursement for compensation paid under former AS 23.30.041(g); which was greater than the amount payable under AS 23.30.041(k). The legislature may choose to clarify the statute by inserting the words "for maintenance" in the third sentence of AS 23.30.041(k). Alternatively, the legislature may choose to clarify AS 23.30.040(b) by substituting statute sections as the descriptors of the forms of compensation subject to Fund contribution.

The commission holds that reimbursement of compensation paid under AS 23.30.041(k) may not be made until "payments subsequent to those payable for the first 104 weeks of disability" begin. Disability is not inherently inconsistent with

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[68] This decision does not apply to other benefits or attorney fees.

eligibility for, or receipt of, reemployment benefits.[69] An employee must have a disability to qualify for reemployment benefits. An employer whose injured employee reaches medical stability sooner, and suffers a low permanent partial impairment, may not qualify for reimbursement if the liability for disability is not "substantially greater" than would have resulted from the second injury alone. But, if the board determines that the employer's liability is substantially greater, the employer is as entitled to reimbursement as much as the employer whose injured employee suffered permanent total disability. Reimbursement may not be made, however, until 104 weeks of disability[70] have been proved.

d. May the board award attorney fees to an employee against the Second Injury Fund?

The right to an award of attorney fees and legal costs by the board in workers' compensation proceedings is purely statutory.[71] AS 23.30.145 authorizes the board to award attorney fees in certain circumstances. It provides:

> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

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69 *Meek v. Unocal Corp.,* 914 P.2d 1276, 436 (Alaska 1996).

70 Disability is defined in terms of "incapacity to earn . . . wages" instead of physical impairment. AS 23.30.395(16).

71 *M-B Contracting Co. v. Davis*, 399 P.2d 433, 436 (Alaska 1965).

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.
>
> (c) If proceedings are had for review of a compensation or medical and related benefits order before a court, the court may allow or increase an attorney's fees. The fees are in addition to compensation or medical and related benefits ordered and shall be paid as the court may direct.

Fee awards under AS 23.30.145(a) are clearly limited to awards against an employer: "the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded." Fee awards under AS 23.30.145(b) are not specifically limited in the manner stated in AS 23.30.145, but one of the conditions precedent to an award may only be triggered by the employer: "If *an employer* fails to file timely notice of controversy or fails to pay compensation . . . or otherwise resists the payment . . . and if the claimant has employed an attorney in the successful prosecution of the claim." In this case, the board made no findings of fact to support an award against Kennecott, let alone against the Fund, and specifically found that Kennecott was not "successful [in the] prosecution of the claim."[72] It would be inconsistent with the purpose of AS 23.30.145(b) to condition an employer's right to attorney fees against the Fund with the employer's failure to timely controvert or resistance to payment of compensation due to the employee. The legislature could not have intended an irrational operation of the statue.

The board's decision relies on *Second Injury Fund v. Arctic Bowl*[73] to support its holding that "as a general principle, the SIF may be liable for attorney fees."[74] In *Arctic*

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[72] *Raymond Clark, Jr.,* Bd. Dec. No. 07-0077 at 11.

[73] 928 P.2d 590, 596-97 (Alaska 1996).

[74] *Raymond Clark, Jr.,* Bd. Dec. No. 07-0077 at 11.

Bowl, however, the court awarded fees under AS 23.30.145(c), which provides for the award of attorney fees by the courts, and under court rule, for proceedings on appeal. The court did not remand for the *board* to enter a fee award against the Fund. The commission concludes there is no statutory authority permitting the board to award attorney fees against the Fund for defending an employer's demand for reimbursement before the board.[75]

6. Conclusion.

The board's decision that appellee Raymond Clark, Jr., suffered a second injury in his employment by appellant Kennecott Greens Creek Mining Co. is AFFIRMED. The board's decision establishing Second Injury Fund liability but denying Second Injury Fund reimbursement of AS 23.30.041(k) compensation is REVERSED, the order VACATED, and the case is REMANDED for further findings of fact and proceedings in accord with this decision. The board's decision that the Second Injury Fund is subject to awards of attorney fees by the board is REVERSED, but the board's order denying appellants and appellee, cross-appellant Clark an award of attorney fees against the appellee Second Injury Fund is AFFIRMED on different grounds.

The commission does not retain jurisdiction.

Date: *9 June 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[75] Fees may be awarded to any *party* successful in an appeal before the commission; only an injured worker is exempted from awards against unsuccessful parties, provided the worker's position on appeal was not "frivolous or unreasonable or the appeal [filed] in bad faith." AS 23.30.008(d).

APPEAL PROCEDURES

This is a final decision of the commission on this appeal and cross-appeal. This is a not a final administrative agency decision on the petition for Second Injury Fund reimbursement filed by Kennecott Greens Creek Mining Co. The commission affirmed part of the board's decision, but the commission reversed and vacated part of the board's decision and order. The commission remanded this case to the board for further proceedings, but the commission did not retain jurisdiction. The effect of the commission decision is to correct errors of law and to direct the board to complete its proceedings in this case and issue a final decision on the employer's petition for Second Injury Fund reimbursement. The board's final decision may be appealed to the commission.

This decision becomes effective when it is distributed (mailed) by the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of distribution, look at the clerk's Certificate of Distribution box on the last page.

Proceedings to appeal must be instituted in the **Alaska Supreme Court** within 30 days of mailing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. Because this is not a final decision on the employer's petition for reimbursement, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. The commission's decision directs the board decide whether the employer is entitled to reimbursement, so that a final administrative decision has yet to be issued. However, if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

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

RECONSIDERATION

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

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

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 080 in the matter of *Kennecott Greens Creek Mining Co. and Sedgewick Claims Management Services, Inc. v. Raymond Clark and State of Alaska, Second Injury Fund*; Appeal No.07-015; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this __*9*__ day of__*June*__, 200*8*.

Signed
J. Ramsey, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that on *6/9/08* a copy of this Final Decision in AWCAC Appeal No. 07-015 was mailed to: Hoffman, McKinstry, & Batchelor and faxed to McKinstry, Hoffman, Batchelor, AWCB Appeals Clerk, AWCB Juneau & WCD Director.

Signed
J. Ramsey, Deputy Appeals Commission Clerk