Alaska Workers' Compensation Appeals Commission

Alcan Electric and SeaBright Insurance Co.,
Movants,

vs.

Alan James,
Respondent

Final Decision
Decision No. 084 July 18, 2008

AWCAC Appeal No. 08-015
AWCB Decision No. 08-0086
AWCB Case No. 200400897

Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision No. 08-0086 issued on May 13, 2008, by northern panel members William Walters, Chair and Jeffrey P. Pruss, Member for Labor.

Appearances: Robin Jager Gabbert and Merrilee Harrell; Russell, Wagg, Gabbert, & Budzinski for the movants, Alcan Electric and SeaBright Insurance Co. Robert M. Beconovich, Esq. for the respondent, Alan James.

Commission proceedings: Oral argument on Motion for Extraordinary Review presented on June 20, 2008.

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

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

By: Kristin Knudsen, Chair.

1. Introduction.

The movants, Alcan Electric and SeaBright Insurance Co., filed a petition with the board to dismiss Alan James's workers' compensation claim because his claim had expired under AS 23.30.110(c). They also filed a petition to hear the petition to dismiss before the hearing on the merits of the claim. Workers' Compensation Officer Kokrine denied the petition and Alcan Electric appealed to the board. The board affirmed Officer Kokrine's decision not to hear Alcan Electric's petition to dismiss separately, before the hearing on the merits of James's workers' compensation claim. The movants now ask the commission to grant extraordinary review of the board's denial of the

request to schedule the hearing on the petition to dismiss before the hearing on the claim merits. The movants assert that they are denied due process because Officer Kokrine failed to provide reasons for the denial. The movants also assert that the board failed to apply the proper standard of review to Officer Kokrine's decision. Finally, the movants assert that, because they are required to prepare for a hearing on a claim for compensation that is expired, they are unfairly subjected to considerable expense. The respondent contests these assertions, and argues that the motion for extraordinary review is motivated by a desire to impose Anchorage practices on a community that has no means of implementing them. The respondent also argues that, because an appeal seems inevitable, he will be in a better position on appeal, and his attorney's efforts more productive and economical, if the facts of the respondent's injury and disability are fully developed in the record.

The parties' assertions require the commission to decide if the movants have established that (1) the postponement of review will result in injustice and significant undue expense; (2) immediate review may advance the termination of the litigation and the board's order involves an important question of law; or, (3) Officer Kokrine, and the board on review, so far departed from the requirements of due process, as to require the commission's review. The commission must also determine that the strong policy of taking appeals from final decisions is outweighed by the circumstances demonstrated by the movants.

2. Summary of decision.

The commission concludes that Officer Kokrine's pre-hearing conference summary did not provide a basis for her decision to depart from the regulations. However, as the movants agreed to the process outside the regulations and did not preserve their objections, and later events have provided opportunity for correction, the movants failed to establish prejudicial error requiring immediate review. The commission also concludes that the board's decision contains possible error, but, because the movants did not demonstrate what material evidence would have been provided to the board or Officer Kokrine relevant to the factors favoring bifurcation, failure to consider those factors by Officer Kokrine or the board did not prejudice the

movants. Immediate review by the commission will not advance termination of the litigation; if the appeal is allowed, resolution of the merits of the petition to dismiss the claim will only be delayed. The movants' argument that preparing for hearing the merits of the respondent's claim is an undue expense is based on the premise that the board will grant the petition to dismiss, which the respondent does not concede. Finally, the commission concludes the board may not consider the likelihood of one party prevailing over another on the merits of the claim, or of an attorney's ability to recover his fee, as a reason to avoid bifurcation. The commission denies the motion for extraordinary review.

3. Factual background and board proceedings.

The following summary of facts is drawn from the movants' brief, which was not opposed by the respondent, the hearing transcript, and the board's decision. When deciding if the commission should grant extraordinary review, the commission does not review the board's findings to determine whether the findings are supported by substantial evidence in light of the whole record.

Alan James reported a knee injury in January 2004. He filed a claim for compensation and knee surgery in March 2004. The next month, Alcan Electric controverted the claim based on an employer medical examination, using a board-prescribed form, asserting lack of relationship between the knee injury and the employment. At the end of November 2005, James, through his attorney, filed another claim, seeking permanent total disability compensation, medical benefits, penalty and interest. Alcan Electric controverted the claim for "ongoing medical treatment and medical benefits" based on two employer medical examination reports on December 20, 2005, again asserting the disability and the need for treatment were not work-related. Over the next year, James filed three medical summaries, the last in June 2006. No further activity occurred until James filed an affidavit of readiness to proceed on January 30, 2008, more than two years after the December 20, 2005, controversion, and more than three years after the March 2004 controversion. Alcan opposed the affidavit of readiness.

On February 11, 2008, Alcan filed a petition for dismissal of the claims, based on expiration under AS 23.30.110(c). Alcan's petition also requested a separate hearing on this defense. An affidavit of readiness to proceed on the petition was filed March 3, 2008. Before the time passed for James to object to Alcan's affidavit of readiness, the parties met for a pre-hearing conference on March 5, 2008.

At the conference, according to Workers' Compensation Officer Kokrine's summary, Alcan's attorney requested a hearing on the petition to dismiss "at a procedural hearing prior to the EE's claim being heard." Officer Kokrine, conducting the conference as chair, "stated that ER's Petition and EE's claim will be heard at the same hearing with ER's Petition being heard first." Officer Kokrine continued, "Ms Gabbert [Alcan Electric's attorney] stated that she has filed an ARH on ER's Petition to Dismiss and is not waiving the 60 day time limit for setting a hearing." Officer Kokrine set the hearing date for the petition to dismiss and the claim "for July 31, 2008 pursuant to the regulations." The pre-hearing summary was served on March 10, 2008.

James filed an opposition to the affidavit of readiness March 11, 2008. Alcan Electric filed a petition for board review of Officer Kokrine's decision on March 20, 2008. The parties agreed to the board hearing the matter on May 8, 2008. The transcript includes the following statement by Alcan's attorney:

> I asked Ms Cochrane [sic] at the prehearing to state her basis for bifurcation or for denying bifurcation, and her response was that we don't do that in Fairbanks. That was the basis. Nothing further was set forth in the prehearing conference summary to justify that decision. So one wonders, well, which didn't she split off this and let it be heard first, and I think it's frankly, because of the board's decision in the Irby case, which I'm sure you are familiar with, and I think that has made our prehearing conference officer here a little overly cautious.[1]

James's attorney argued that "there are not simple .110(c) issues." He did not, he argued,

> want to talk too much in regional dialect, but [he] appreciate[s] that there is a practice in Anchorage of setting on procedural

[1] Tr. 8:13-23.

> hearings, but the board is aware that [he's] obligated to work under the limitations in 23.31.045 [sic], and only those limitations at the board level. If this matter were to proceed to a hearing on the statute of limitations and were to result in our favor, then [they]'d proceed – want to proceed to hearing. If it's resolved against [them], essentially [they]'re going to get into a situation where it's going to get appealed and [he's] going to end up, frankly, with Mr. James in the lurch, and the only person to fill that gap is essentially [him]. . . . the practicality of it is that if it were to be decided adverse to Mr. James, [he]'d have to appeal it. If it's decided in [James's] favor, they're going to appeal it, and we're injecting a one year, at least, delay . . . and that's what [James and his attorney] seek to avoid.[2]

The board's decision on the petition to dismiss surely would be appealed, he argued, leaving Mr. James "in the lurch."[3] He added, "ultimately one of the persons left on financial lurch is my office."[4]

The board's decision cited the "specific delegated discretionary authority to set hearings and determine issues to be heard" in 8 Alaska Admin. Code 45.065 and 8 Alaska Admin. Code 45.070.[5] The board acknowledged that in other cases, "potentially

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[2] Tr. 13:24-14:20.

[3] Tr. 15:12-14.

[4] Tr. 15:15-16.

[5] *Alan C. James v. Alcan Electrical & Engineering, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 08-0086, 6 (May 13, 2008) (W. Walters, Chair). 8 Alaska Admin. Code 45.065 provides in relevant part:

> (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
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> (1) identifying and simplifying the issues;
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> * * *
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> (15) other matters that may aid in the disposition of the case.

(b) The designee will, in the designee's discretion, conduct prehearings or settlement conferences without the presence of the board members.

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

(e) The board or designee may set a hearing date at the time of the prehearing. The board or designee will set the hearing for the first possible date on the board's hearing calendar unless good cause exists to set a later date. The primary considerations in setting a later hearing date will be whether a speedy remedy is assured and if the board's hearing calendar can accommodate a later date.

(f) The designee may conduct more than one prehearing on a claim or petition.

* * *

AS 23.30.070(c) provides in pertinent part,

> If an affidavit of opposition to a hearing on a claim for compensation or medical benefits is filed in accordance with this subsection, the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties. If the affidavit of opposition is not in accordance with this subsection, and unless the parties stipulate to the contrary, the board or its designee will schedule a hearing within 60 days, and will

dispositive issues" have been heard separately.[6] In this case, however, when the employer requested a hearing, the employer "did not yet have a right to have its Petition to Dismiss set for a separate hearing at all" when the prehearing conference occurred because the time for opposing the affidavit of readiness had not passed.[7] The board found that by setting the petition to dismiss as the first matter for hearing July 31, 2008, Office Kokrine had protected the employer's rights and had not abused her discretion.[8] The board ordered that the "Prehearing Conference Summary of March 5, 2008 is affirmed in all respects, and remains in full force and effect" under 8 Alaska Admin. Code 45.065(c).[9]

4. Discussion.

The commission will grant extraordinary review of a non-final board order only when the movant demonstrates the circumstances described in 8 Alaska Admin. Code 57.076(a) exist:

> The commission will consider and decide a motion under this section as soon as practicable. The commission will grant a motion for extraordinary review if the commission finds the sound policy favoring appeals from final orders or decisions is outweighed because
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> (1) postponement of review until appeal may be taken from a final decision will result in injustice and unnecessary delay, significant expense, or undue hardship;
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> (2) an immediate review of the order or decision may materially advance the ultimate termination of the litigation, and
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> > (A) the order or decision involves an important question of law on which there is substantial ground for difference of opinion; or

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exercise discretion in holding a prehearing conference before scheduling a hearing.

6 *Alan C. James,* Bd. Dec. No. 08-0086 at 6.

7 *Id.* at 7.

8 *Id*.

9 *Id*. at 8.

> (B) the order or decision involves an important question of law on which board panels have issued differing opinions;
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> (3) the board has so far departed from the accepted and usual course of the board's proceedings and regulations, or so far departed from the requirements of due process, as to call for the commission's power of review; or
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> (4) the issue is one that otherwise would likely evade review, and an immediate decision by the commission is needed for the guidance of the board.

The commission does not grant extraordinary review lightly. The test for extraordinary review is difficult to satisfy and the decision to grant review is always based on the facts of a particular case. The commission has granted only three motions for extraordinary review. Two of the cases in which the commission granted review involved questions of law concerning the Second Independent Medical Examination process in circumstances in which the issues could easily evade review.[10] The third case concerned important and unsettled questions of law regarding both the statute of limitations and expiration of claims, where resolution could hasten termination of the litigation.[11]

The commission has consistently adhered to the strong policy favoring appeals from final decisions, even in the face of possible board error. The commission has consistently denied motions for extraordinary review where there is no ripe dispute requiring commission intervention.[12] The commission has denied review, although an

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[10] *Sellers v. State Dep't of Education & Early Dev.*, Alaska Workers' Comp. App. Comm'n Dec. No. 043 (May 25, 2007) (regarding the record created for the examiner); *Olafson v. State Dep't of Trans. & Pub. Facilities*, Alaska Workers' Comp. App. Comm'n Dec. No. 027 (Jan. 11, 2007) (grounds for objecting to an appointed examiner based on a conflict of interest).

[11] *Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 028, 2006 WL 4010601 (Jan. 17, 2006).

[12] *BP Exploration Alaska, Inc. v. Stefano*, Alaska Workers' Comp. App. Comm'n Dec. No. 076, 2008 WL 2065075 (May 6, 2008); *Smith v. CSK Auto, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 017, 2006 WL 3325419 (Aug. 28, 2006); *Berrey v. Arctec Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 009, 2006 WL

important question of law was presented, because commission review would not materially advance termination of the litigation due to an incomplete factual record, or where resolution of disputed facts could render the disputed issue moot.[13] The commission denied a motion for extraordinary review because it was filed late, despite a strong possibility of board error.[14] The commission denied review, although an important question of law was presented, because it was not likely to evade review and the party requesting review will not suffer injustice by waiting for a final decision on the merits.[15]

Every appeal involves a party's claim that the board erred as a matter of law; legal error, if it exists, generally will not result in injustice if the error is corrected on appeal.[16] The commission's regulations at 8 Alaska Admin. Code 57.072-.076 are designed to avoid unnecessary meddling in the board's fact-finding process. The circumstances that require commission intervention in that process are not present in this case.

3325413 (April 28, 2006); *Municipality of Anchorage v. Syren,* Alaska Workers' Comp. App. Comm'n Dec. No. 007, 2006 WL 3325412 (AWCAC March 7, 2006); *Eagle Hardware & Garden v. Ammi*, Alaska Workers' Comp. App. Comm'n Dec. No. 003, 2006 WL 3325404 (Feb. 21, 2006).

[13] *Pacific Log & Lumber v. Carrell*, Alaska Workers' Comp. App. Comm'n Dec. No. 047, 2007 WL 1965954 (June 29, 2007); *ENCO Heating v. Borgens*, Alaska Workers' Comp. App. Comm'n Dec. No. 034, 2007 WL 687635 (Feb. 26, 2007); *Chena Hot Springs v. Elliott*, Alaska Workers' Comp. App. Comm'n Dec. No. 026 (Jan. 11, 2007); *Alaska Ins. Guaranty Ass'n. and Northern Adjusters vs. Edwin Simons,* Alaska Workers' Comp. App. Comm'n Dec. No. 011 (June 2, 2006).

[14] *Kuukpik Arctic Catering v. Harig*, Alaska Workers' Comp. App. Comm'n Dec. No. 038, 2007 WL 1456190 (Apr. 27, 2007).

[15] *State of Alaska, Dep't of Corrections v. Dennis*, Alaska Workers' Comp. App. Comm'n Dec. No. 032, 2007 WL 1040845 (Mar. 27, 2007).

[16] *BP Exploration Alaska, Inc. v. Stefano*, Alaska Workers' Comp. App. Comm'n Dec. No. 076 at 19.

a. The movant demonstrated the possibility of pre-hearing conference officer error, but the error is not sufficiently prejudicial to movants' rights as to require immediate review.

The board found, on reviewing Officer Kokrine's decision, that the basis for her decision was adequately explained by the comment that the hearing date was set "pursuant to the regulations." However, had Officer Kokrine strictly followed the regulations, she would not have set a hearing date on the petition to dismiss. The board noted that Officer Kokrine was required by regulation to set the claim on for hearing within 60 days after a prehearing conference following an objection to an affidavit of readiness for hearing. Officer Kokrine set the case for hearing on July 31, 2008, more than 60 days after the March 5, 2008, pre-hearing conference. Thus, although Officer Kokrine's conference notes do not say so, the hearing date was either agreed to by the parties or "the first possible date on the board's hearing calendar," or "good cause" existed to set a later date.[17] Thus, the board may have understated the effect of the regulation when it said that Alcan "did not yet have a right to have its Petition to Dismiss set for a separate hearing at all." At that point, Officer Kokrine was not *required* to set the petition on for hearing, separate *or otherwise*, by the regulation.

Officer Kokrine set the petition on for hearing for the same date set for the claim. Since the party requesting the hearing date for the petition clearly did *not* agree to the hearing date, and was unwilling to waive the 60-day rule, Officer Kokrine should have waited until the request for a hearing was opposed or unopposed, held another pre-hearing conference, and scheduled a hearing on the petition pursuant to the regulations. However, Officer Kokrine, without apparent objection by James's attorney, agreed to set the petition on for hearing.

There was, however, no agreement to the hearing date. The employer's attorney clearly stated that she did not agree to the date and her client would not waive the requirement that a hearing be scheduled within 60 days of the prehearing conference. Where the board's own regulations require the prehearing officer to

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[17] 8 Alaska Admin. Code 45.065(e).

exercise discretion and to make a finding of "good cause" to set another hearing date, a comment that the date was set "pursuant to the regulations" is not sufficient to give notice of the cause for *departing* from the regulations. The board's ability to review the exercise of the discretion committed to its designee for abuse is hampered if the officer does not state in the prehearing conference summary what requisite good cause she found existed. Therefore, the movant has demonstrated the possibility of board error in a departure from the board's regulations.

Nonetheless, the commission finds the board's error did not result in such prejudice to the movants' rights, or such a departure from due process, that calls for the commission to exercise its power of review. First, Alcan Electric requested that Officer Kokrine set a hearing date at the prehearing conference, instead of waiting for the ordinary process required by the regulations. The request to set a hearing date was not opposed by James's attorney. Thus, both parties agreed to allow Officer Kokrine to set a date; the movant objects to the date set, not the process Officer Kokrine used. Second, in regards to its complaint that the board failed to address Officer Kokrine's verbal statement that "we don't do that in Fairbanks," Alcan did not object to the pre-hearing summary within 10 days after service and ask that it be modified to accurately reflect officer's stated reasons for her actions. Instead, Alcan requested a "change in a prehearing determination."[18] Thus, Alcan asked the board to review the determination and to set a new date. Finally, events after this motion were filed may have mooted the issue. Because the hearing date was moved by agreement to November 2008, there is time for Officer Kokrine to revisit the issue of a hearing on

[18] 8 Alaska Admin. Code 45.065(d) requires a request for a change in determination to be filed within 10 days of the service of the pre-hearing conference summary. While a petition for *review* of the board's designee's order requires the board to review the officer's exercise of discretion for abuse of discretion, a request for a "change in determination," requires the pre-hearing officer, or the board if the request is referred to the board, to make a determination "*de novo*" to change the hearing date. A hearing date may be set by the board or the board's designated officer. 8 Alaska Admin. Code 45.065(e).

the petition to dismiss and to either set an earlier date, or to give a full statement of her reasons for departing from the regulations.

b. The movant demonstrated possible board error, but the movants did not demonstrate prejudice to their rights requiring immediate review.

As we noted above, a request for a change in the pre-hearing officer's determination, as opposed to a request for review of the pre-hearing officer's decision, requires the board to review the determination *de novo* if the request is referred to the board by the designated officer, instead of the designated officer acting on the request under 8 Alaska Admin. Code 45.065(d).[19] On the other hand, if the request challenges the legal basis of the officer's decision or otherwise asserts an abuse of the discretion granted to the designated officer by statute, then the board may review the officer's decision for an abuse of the discretion granted by statute.

For the reasons explained above, Officer Kokrine's stated reason ("pursuant to the regulations") for departing from the regulations to set a hearing date on the petition to dismiss is inadequate to explain why Officer Kokrine *departed* from the regulations. In this case, the board's explanation is no better, since it affirms that Officer Kokrine had no obligation, absent the parties agreement (which did not exist) to set a hearing date on the petition. The board's statement that it was not an abuse of discretion to set the petition to dismiss "as a preliminary matter to the mandatory hearing on the employee's claim" offers no explanation why setting a single hearing date is good cause to depart from the regulations.

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[19] 8 Alaska Admin. Code 45.065(d) provides

> Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

The board has developed a number of factors to be considered in deciding if a petition to dismiss or other dispositive petition should be heard before the merits of the claim. The commission, after reviewing the board's cases, and being familiar with board practice and the problems associated with bringing workers' compensation cases to a final resolution in an orderly and fair manner, suggests that the following factors should be considered when a dispositive petition is accompanied by a request for a hearing before the hearing on the merits. In effect, these factors, if considered, should assist the designated officer in determining if good cause exists to depart from the regulations with regard to setting hearing dates for dispositive petitions.

First, the board or officer should consider the complexity of the case as a whole, and severability of contested factual or legal disputes. For example, a dispositive petition without material contested facts that turns on a single question of law should be decided before a hearing on the merits of the case. On the other hand, a dispositive petition requiring resolution of factual disputes in a case with significant intermingling of factual issues or credibility challenges between the petition issues and the merits of the claim, that cannot be readily severed, should not be heard separately, but presented as a preliminary matter with the hearing of the merits of the case. Second, the board or officer should consider the contribution of the parties to fair, orderly and economical resolution of the case. If the parties are able to cooperate amicably in presenting the case in an orderly and economical way and have relatively equal abilities to present argument on the dispositive petition in writing, the petition may be heard "on the record," or the hearing devoted largely to presentation of evidence on the claim merits, while the dispositive petition is presented in writing. If the parties are tenacious in their respective positions to the point that certain procedural or jurisdictional issues will consume time at hearing that should be devoted to the merits of the case, and one of the parties is unable to present coherent legal argument in writing, an oral hearing on the petition before the hearing on the merits will probably be preferred. Third, the board or officer should consider if a party has alleged all the elements (presents a prima facie case) of a defense in a petition to dismiss the claim that would, if valid,

dispose of the entire case.[20] Fourth, the board or officer should consider if the board, and the parties, will be saved considerable time and expense to prepare for hearing, as well as the imposition on witnesses ordered to appear and testify, if the dispositive petition is successful and the possibility of settlement exists if the dispositive petition is not successful. Fifth, the board or officer should consider the board calendar, and whether the possible benefits of hearing the dispositive petition first and separately outweigh the burden to the claimant associated with any delay of the hearing on the merits and the burden to the defendants if presentation of evidence on the merits affects fair consideration of the dispositive petition.

The movants did not present evidence to the board going to these factors, such as the anticipated costs of depositions that could be saved, the tenacity and complexity of the litigation, the benefits to the opposing side, or relative ability of the parties to present the petition to dismiss in writing for decision before the hearing. The movants argued that it would be saved costs of preparing for a hearing on the claim, assuming its petition was granted. However, if the petition to dismiss was denied, the movants would still need to prepare for hearing. The movants did not demonstrate the board prevented them from presenting evidence or argument bearing on the factors listed above, that, if examined by the board or the board's designated officer, could have resulted in a different outcome. Moreover, the movement of the hearing date to November 2008 gives the board opportunity to revisit the question whether the hearing on the petition to dismiss should be scheduled for a date before the hearing on the claim's merits. For that reason, the commission declines to hold that the board's error so prejudiced the fair consideration of the movants' arguments and evidence, violated the requirements of due process, or so greatly departed from the board's own regulations, that the commission must intervene.

[20] For example, the employer is not subject to Alaska's workers' compensation statutes, the employee is excluded by law from coverage by Alaska workers' compensation, or the claim requests benefits not provided by the Alaska Workers' Compensation Act.

c. Review now will only delay resolution of the petition to dismiss and the hearing on the merits.

The movants ask the commission to allow an appeal of a decision setting the hearing date of the motion to dismiss on the same date as the hearing on the merits. There has been no decision on the petition to dismiss. The hearing on the merits of the claim was moved, with the parties' joint consent, from July 31 to November 2008. If the commission were to take jurisdiction, and allow an appeal of the decision to set a single hearing date, the result would be no hearing, of petition or merits, until the appeal was concluded. On the other hand, if the commission refrains from exercising review, the parties and the board will have the opportunity, between July and November, to revisit the request for an early hearing. Officer Kokrine may consider the factors and decide whether the petition to dismiss should be heard separately before the merits of James's claim. The commission concludes that the resolution of this case will not be hastened by the commission's review of the board's decision.

d. The board may not consider the attorney's fee arrangement as a reason to avoid bifurcation.

The respondent argued to the commission that an adverse decision on the petition to dismiss would be appealed, and his case would not proceed upward on a "complete record" (containing all the medical information and other information regarding the claimant's condition), unless the petition to dismiss was decided with the merits of the claim. He also argued that because he is paid on a contingent fee, it was important that there be a single decision and record, so that he need prepare only a single appeal. Essentially, respondent argues that the board could delay hearing the movants' petition in order to spare the respondent's attorney from having to defend, or bring, an appeal from the board's decision on the dispositive motion.

Like movants, who assume that a decision on their petition to dismiss must be in their favor, respondent's reasoning assumes that a decision on the petition must be adverse to the respondent or that it will be appealed by the movants if it is not. This reasoning is flawed. First, an appeal of denial of a petition to dismiss would only be allowed on a motion for extraordinary review, and the commission does not frequently

grant extraordinary review. It is not at all certain that significant delay would ensue. Second, if the board's decision is adverse to the claimant, all parties are spared the expense of a full hearing on the merits, including the claimant, but the claimant retains a right of appeal and, if successful, the right to a hearing on the merits of the claim.

However, respondent did not confine himself to an argument based on the proposition that bifurcation would probably result in unnecessary expense and delay. The argument presented by respondent's counsel to the board, containing frequent references to "what .145 requires,"[21] also suggested that the board ought to consider the likelihood of the attorney receiving payment for his services when deciding hearing dates on dispositive motions, or that the hearings ought to be arranged with a view to encouraging the best opportunity for his success *because* his attorney is paid on a contingent fee. The attorney's prospect of payment of a contingent fee should not be considered by the board, because to do so encourages a pre-judgment of which party ought to prevail at hearing. Apart from noting the argument made by the respondent, the board properly did not comment on the attorney's fee arrangement.

5. Conclusion.

The motion for extraordinary review is DENIED. The commission advises the parties that the petition requesting a hearing date on the dispositive petition to dismiss may be re-filed, so that the board or its designee may determine whether to hold an earlier hearing on the petition to dismiss in light of the movement of the hearing date on the claim to November 2008 and the factors discussed above.

Date: ___*18 July 2008*___ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[21] Tr. 14:11.

APPEAL PROCEDURES

This is a final decision on the merits of this motion for extraordinary review, but it is not a final decision on the claim for workers' compensation, AWCB Case No. 200400897. The effect of this decision is that the workers' compensation claim may continue to proceed to hearing or other resolution before the Alaska Workers' Compensation Board. This decision does not affect the final decision of the board on the claim.

Because this is not a final commission decision on an appeal of a final board order on a claim, the Supreme Court may not accept an appeal under AS 23.30.129. An appeal, if available, must be instituted in the Supreme Court within 30 days of the date this decision is distributed. See the box below to find the date of distribution.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review or hearing within 10 days after the date of distribution of this decision. You may wish to consider consulting with legal counsel before filing a petition or an appeal.

If you wish to appeal (or petition for review or hearing) 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. 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). If appeal is not available, proceedings for other review under the Appellate Rules must be instituted within 10 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 40 days after the date this decision is mailed to the parties, whichever is earlier.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 084, Final Decision on the Motion for Extraordinary Review in *Alcan Electric and SeaBright Insurance Co. v. Alan James,* AWCAC Appeal No. 08-015, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission at Anchorage, Alaska, this *18th* day of *July*, 2008.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on *7/18/08* a copy of this Final Decision in AWCAC Appeal No. 08-015 was mailed to Gabbert & Beconovich at their addresses of record, and faxed to Gabbert, Beconovich, AWCB Appeals Clerk, AWCB-Fbx, & WCD Director.

Signed *7/18/08*
J. Ramsey, Deputy Commission Clerk Date