Alaska Workers' Compensation Appeals Commission

Linda Schouten,
Appellant,

vs.

Alaska Industrial Hardware and AIG Claims Services,
Appellees.

Final Decision
Decision No. 094 December 5, 2008

AWCAC Appeal No. 07-036
AWCB Decision No. 07-0248
AWCB Case No. 200515544

Appeal from Alaska Workers' Compensation Board Decision No. 07-0248, issued at Anchorage, Alaska on August 17, 2007, by the southcentral panel members Fred Brown,[1] Chair, Linda Hutchings, Member for Industry, and David Robinson, Member for Labor.

Appearances: Charles Coe, for appellant Linda Schouten. Colby Smith, Griffin and Smith for appellees, Alaska Industrial Hardware and AIG Claims Services.

Commission proceedings: Appeal filed September 17, 2007. Appellant's request for extension of time to file opening brief granted by the chair November 29, 2007. Appellant's second request for extension of time to file opening brief granted by the commission panel January 2, 2008. Order granting final extension of time to file appellant's opening brief issued January 25, 2008. Order denying request for fourth extension of time issued by the commission panel February 14, 2008; late-filed brief accepted March 5, 2008. Notice of change in commissioner assignment given March 6, 2008. Appellees' request for extension of time to file brief granted by the chair March 24, 2008. Oral argument on appeal presented September 9, 2008.

Commissioners: David Richards,[2] Stephen Hagedorn, Kristin Knudsen.

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

By: Stephen Hagedorn, Appeals Commissioner.

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[1] Fred G. Brown, a hearing officer in Fairbanks, was temporarily assigned to serve on the southcentral panel for this case.

[2] David W. Richards was appointed to the seat on the commission vacated by John Giuchici, the appeals commissioner first assigned to this appeal.

1. Introduction.

Linda Schouten appeals the board's decision to suspend her claim for temporary total disability payments because she was not attending her physical therapy appointments. The board concluded that Schouten had unreasonably failed to mitigate her disability pursuant to AS 23.30.095(d); therefore, the board suspended temporary total disability compensation from the time the employer controverted her claim until she successfully completed physical therapy. Schouten contends the board has no authority to retroactively deny her benefits under *Metcalf v. Felec Services*[3] or to make its award contingent on completion of physical therapy, especially when the employer did not petition to suspend benefits because of a failure to comply with medical treatment.

The appellees argue that the board implicitly found that Schouten was medically stable on July 5, 2006, because of her refusal to undergo physical therapy, and that as a result, she was not entitled to temporary total disability (TTD) benefits after that date. The appellees contend substantial evidence supports the board's findings that Schouten unreasonably refused physical therapy and failed to mitigate her disability.

The parties' contentions require the commission to determine the scope of the board's authority to address questions that the parties have not raised and to retroactively suspend benefits. In addition, the commission must examine whether the board made adequate findings of fact.

The commission concludes that the board failed to decide the issue raised by the employer's petition, that being whether Schouten's TTD benefits should end because she had reached medical stability. In addition, the commission concludes that the board may not retroactively suspend an employee's TTD as of the date that the employer controverted benefits under *Metcalf v. Felec Services*.[4] Therefore, the board's decision is vacated and the case is remanded with instructions to decide the issue of Schouten's medical stability.

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[3] 784 P.2d 1386 (Alaska 1990).

[4] *Id.*

2. Factual background.

Linda Schouten was a storage center manager hired by Alaska Industrial Hardware (AIH) on July 15, 2005.[5] She reported that on September 12, 2005, she injured herself while trying to close a garage bay door.[6] She filed a notice of occupational injury on September 23, 2005.[7]

She was seen by a number of different physicians, including Dr. Edward Barber and Dr. John Duddy.[8] Both doctors diagnosed pre-existing spondylolisthesis at L5-S1 vertebral level.[9] Dr. Duddy also noted that she had degenerative disc disease and that both conditions were acutely exacerbated.[10] Dr. Duddy recommended a spine management class and physical therapy, but he noted that Schouten refused to participate in physical therapy.[11] Dr. Barber did a series of chiropractic treatments in September and October 2005.[12]

Schouten sought a second opinion from Dr. Edward Voke, who diagnosed the same conditions as Dr. Duddy and also recommended physical therapy.[13] Drs. Voke and Duddy referred her to the Alaska Spine Institute, where Dr. Sean Taylor evaluated her.[14] A physical therapist, Jim Werner, at the Alaska Spine Institute recommended physical therapy two times a week.[15] In February and March 2006, Schouten attended

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5 R. 0001.

6 R. 0001.

7 R. 0001.

8 R. 0110-11, 0143-47.

9 R. 0111, 0147.

10 R. 0111.

11 R. 0111, 0273.

12 R. 0135-37, 0158, 0163-65.

13 R. 0114.

14 R. 0171, 0236.

15 R. 0237.

physical therapy four times,[16] cancelled three times,[17] and "no showed" for her remaining four appointments.[18] Schouten missed at least one of the appointments because she was ill.[19] Her reasons for not attending the other appointments included that she was in pain and that her prescription for physical therapy ran out.[20]

She went back to Dr. Duddy on April 24, 2006. He noted that Schouten had not kept her January appointment and noted, again, she refused all physical therapy.[21] An employer's medical evaluation was scheduled and Dr. Steven Schilperoort examined Schouten on May 8, 2006.[22] He concluded that she may have had a soft tissue sprain as a result of the September 12, 2005, injury,[23] but that she had reached medical stability as of May 8, 2006.[24] Dr. Schilperoort found her pain complaints were disproportionate to her injury[25] and gave her a zero percent permanent partial impairment rating.[26] Based on this report, AIH controverted TTD and medical benefits on July 5, 2006, stating that:

> Dr. Schilperoort opinioned [sic] that the employee's 9/12/05 work injury may have symptomatically aggravated the pre existing conditions . . . Dr. Schilperoort has concluded that the symptomatic aggravation that may have been caused by the Sept. 12, 2005 injury has resolved with no permanent impairment of function. Dr. Schilperoort has also opinioned

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16 R. 0228, 0231, 0233-34.

17 R. 0229-30, 0232.

18 R. 0224-27.

19 R. 0230.

20 Hrg. Tr. 16:2-4; 16:25; 18:8-9.

21 R. 0119.

22 R. 0206.

23 R. 0216.

24 R. 0217-19. He noted that "Due to paucity of medical records, I am unable to affirm medical stability until today's evaluation." R. 0219.

25 R. 0215, 0218.

26 R. 0219.

> [sic] that additional treatment is neither reasonable nor necessary for the date of injury of 9/12/05.[27]

3. Proceedings before the board.

Schouten filed a claim for TTD and medical benefits on August 1, 2006.[28] The employer answered the claim on August 17, 2006, checking off the following affirmative defenses: "The case cannot be completely heard at the first hearing because necessary discovery is not complete"; "Employee's injury or illness stems from a long-standing pre-existing condition"; "Employee's work is not a substantial factor in HIS/HER injury or disability, if any"; and "We reserve the right to raise further defenses after discovery."[29] The employer did not check the boxes for the affirmative defenses of "The employee has failed to mitigate HIS/HER damages" and/or "The employee has failed to mitigate HIS/HER disability."[30]

The parties agreed there was a medical dispute and stipulated to a Second Independent Medical Examination (SIME),[31] which Dr. Thomas Gritzka performed.[32] He found that she had a lumbosacral sprain superimposed on her pre-existing L5-S1 spondylolisthesis and degenerative disc disease.[33] He stated that her back pain was related to the work injury,[34] but that her pain was due to deconditioning and she needed physical therapy to rebuild the muscle.[35] He said she probably would be able to return to work with some accommodations, such as being able to walk around when

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27 R. 0002. The controversion notice was dated July 5, 2006, and stamped as received, apparently by the board, on July 6, 2006. R. 0002.

28 R. 0008.

29 R. 0011-12.

30 R. 0011.

31 R. 0434.

32 R. 0121.

33 R. 0128.

34 R. 0129.

35 Gritzka Depo. 39:19-23, 40:1-10.

her back hurt.[36] He stated that she was not medically stable because she could improve with physical therapy,[37] but he also said that if she would not do physical therapy she should be considered medically stable as of April 24, 2006.[38]

Before the board, Schouten argued that Drs. Gritzka, Voke and Duddy believed that she needed physical therapy and, therefore, that she was not medically stable.[39] She asserted her problems were still related to her industrial injury, and noted that only the employer's doctor, Dr. Schilperoort, believed that she had recovered from the work injury and returned to her pre-existing condition.[40] She also argued that Dr. Duddy did not release her to return to work and that he wanted her to try a TENS unit, which was not provided by the employer.[41]

Before the board, the employer admitted that Schouten had established the preliminary link that her injury was work-related but it asserted that it had rebutted the presumption of compensability by Dr. Schilperoort's report that Schouten was medically stable[42] and that Schouten was not *entitled* to *further* benefits because she failed to mitigate her disability by unreasonably refusing medical treatment AS 23.30.095(d).[43] The employer argued that Schouten's lack of cooperation with physical therapy was an unreasonable failure to mitigate her disability.[44] The employer did not argue that Schouten's *past* TTD benefits should be suspended, but rather its argument seemed to be that because she would not cooperate with physical therapy, she was medically stable and, therefore, no longer entitled to TTD.

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36 Gritzka Depo. 34:12 – 35:15.

37 Gritzka Depo. 26:17 – 27:9.

38 Gritzka Depo. 29:15 – 30:4, 31:3-5.

39 R. 0048.

40 R. 0046-47.

41 R. 0046.

42 R. 0095.

43 R. 0095-0102.

44 R. 0095-0102.

The board analyzed Schouten's claim under the three-step presumption analysis. Based on Dr. Voke's medical findings and Schouten's testimony, the board found sufficient evidence to establish a preliminary link that the employee's injury and continuing condition were work related.[45] The board then found that AIH rebutted the presumption with the opinion of Dr. Schilperoort who found her medically stable on May 8, 2006.[46] The board concluded by the "greater weight of evidence," that Schouten's condition was work related.[47] The board then cited AS 23.30.095(d), which states:

> If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order suspend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the period of suspension, unless the circumstances justified the refusal.

The board found that Drs. Duddy, Voke, Gritzka and Schilperoort agreed that "objective improvement of [Schouten's] condition could be achieved if [she] was compliant with physical therapy."[48] The board concluded that it was unreasonable for Schouten to refuse to engage in or to postpone physical therapy.[49]

Therefore, the board suspended Schouten's temporary total disability benefits starting on July 5, 2006, the date the employer controverted her benefits, "until she successfully completes a physical therapy program."[50] The board did not make any findings on medical stability. The board required the employer to pay for medical

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[45] *Linda Schouten v. Alaska Industrial Hardware*, Alaska Workers' Comp. Bd. Dec. No. 07-0248, 8 (Aug. 17, 2007).

[46] *Id.*; R. 0217-19.

[47] *Linda Schouten*, Bd. Dec. No. 07-0248 at 9. The board did not specify what condition was work-related, or if it meant Schouten's present condition, or past condition. The commission assumes, from the context of the board's finding, that the board meant a present condition that may be alleviated by physical therapy.

[48] *Id.* at 10.

[49] *Id.*

[50] *Id.*

benefits "to assist her with physical therapy, which may include a TENS unit, medication and/or psychological assistance."[51] Schouten appeals.

4. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[52] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented to the commission.[53] A board determination of credibility of a witness who testifies before the board is binding on the commission.[54] "The board has the sole power to determine the credibility of a witness" and to weigh the evidence from a witness's testimony, including medical testimony and reports.[55] However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[56] The scope of the board's authority is a question of law.[57]

5. Discussion.

a. The board lacked the authority to decide to suspend Schouten's temporary total disability benefits without prior notice to the parties.

The primary issue before the board was whether Schouten was entitled to temporary total disability compensation from July 6, 2006, to the present. AIH controverted benefits because its doctor found that Schouten was medically stable.[58]

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51 *Id.* at 11.

52 AS 23.30.128(b).

53 AS 23.30.128(a).

54 AS 23.30.128(b).

55 AS 23.30.122.

56 AS 23.30.128(b).

57 *See Simon v. Alaska Wood Prods.,* 633 P.2d 252, 254 (Alaska 1981) (stating that the Court will give "fresh consideration" to the board's decision because the appeal challenged the board's "authority to render the decision it made in this case," a question of law).

58 R. 0002.

"Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability."[59] Medical stability means:

> [T]he date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence.[60]

The board did not decide whether Schouten was medically stable. The board did not discuss the issue of medical stability after it concluded that the employer presented sufficient evidence to rebut the presumption of compensability.[61] The board did not address medical stability in its order.[62] Instead, the board reframed the issue, and issued an order making past and future TTD benefits contingent upon the *completion* of physical therapy.[63]

The commission concludes that the board lacked the authority to suspend Schouten's TTD benefits because this issue was not properly before the board. In *Simon v. Alaska Wood Products*, the Supreme Court held that the board was limited to deciding "questions raised by the parties or by the agency upon notice duly given to the parties."[64] AIH did not request suspension by filing a petition; rather, it claimed that

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[59] AS 23.30.185.

[60] AS 23.30.395(27).

[61] *Schouten*, Bd. Dec. No. 07-0248 at 8-12.

[62] *Id*. at 12.

[63] *Id*. at 10-11.

[64] 633 P.2d at 256 (limiting the board's authority to 'hear and determine all questions' relating to a workers' compensation claim under AS 23.30.110(a)).

Schouten was medically stable, either because Dr. Schilperoort found that her work-related injury had resolved or because she refused to cooperate with physical therapy.[65]

Moreover, the board did not give any notice to the parties that it was considering the issue of suspending TTD benefits. The board's regulations limit the issues at hearing to those summarized at the prehearing conference.[66] In Schouten's case, the final prehearing conference was held on April 6, 2007.[67] The summary listed the issues as: "08/01/06 EE's WCC, part of body injured – low back, TTD from 7/5/06 to present, medical costs, attorney fees and costs."[68] The summary thus included no mention of suspending TTD under AS 23.30.095(d). Under defenses, the summary listed: "07/05/06 ER's controversion notice/all benefits controverted" and "08/17/06 ER/carrier Answer to EE's WCC."[69] Similarly, neither the employer's controversion nor its answer raised the issue of suspending Schouten's temporary total disability. Without notice, Schouten could not be adequately prepared to defend this issue.[70]

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[65] The employer made these arguments in its hearing brief, R. 0095-0102, and at hearing, Hrg. Tr. 8:12 – 10:1. The employer also raised the issue of medical stability in its controversion notice, R. 0002.

[66] 8 AAC 45.065(c) provides in part that: "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 course of the hearing." 8 AAC 45.070(g) provides that: "Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing." *See also Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. Appeals Comm'n Dec. No. 020, 2006 WL 3325410 at *4 (Oct. 5, 2006) (noting that "[t]he board acted in compliance with 8 AAC 45.065(c) by limiting the hearing and its decision to the issues identified on the pre-hearing summary.")

[67] R. 0438. The record indicates a notice was sent out setting another prehearing conference in May 2007 but the record contains neither a summary of that conference nor any indication that it actually occurred.

[68] R. 0438.

[69] R. 0438.

[70] *See Simon*, 633 P.2d at 255 (agreeing with Simon's argument that "ALPAC did not state its intention to contest the work-relatedness of Simon's injury with sufficient clarity to put Simon on notice that he had to defend his claim.")

Thus, the commission concludes that the board acted beyond its authority by considering an issue that was not before it and by not deciding an issue that was properly before it, that being the question of the employee's medical stability.[71]

b. The board may not retrospectively suspend TTD compensation payments because an employee unreasonably refuses medical treatment.

The board suspended Schouten's temporary total disability, from the date of the employer's controversion, July 5, 2006, until "she successfully completes a physical therapy program."[72] The board ruled that Schouten had unreasonably failed to attend physical therapy sessions that were recommended by various physicians.[73]

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[71] The board may have been trying to influence Schouten's behavior so as to resolve the case by fashioning unique relief. The commission believes that alternative dispute resolution mechanisms, including mediation and arbitration, or alternative structured claim resolution, such as "wellness" forums to oversee progress toward recovery and return to work, are within the authority of the board and department to establish. However, the department would need to develop, and the board to approve, regulations governing such alternative dispute resolution methods, including ensuring that all the participants have notice of, and voluntarily agree to, the procedures. *See, e.g.,* Alaska R. Civ. P. 100 (providing guidelines for mediation and other alternative dispute resolution of cases filed in civil court); Ala. Code §§ 25-5-290, 25-5-291, 25-5-292 (providing for mediation of workers' compensation claims in "benefit review conferences" that "shall be held only by agreement of the employer and employee and shall not be deemed mandatory"); Colo. Rev. Stat. § 8-43-205 (requiring a "simple nonadversarial method for the mediation" of workers' compensation disputes that "shall be entirely voluntary and shall not be conducted without the consent of all parties to the claim" and requiring the adoption of rules and regulations to implement the program); Colo. Rev. Stat. § 8-43-206.5 (permitting parties in a workers' compensation dispute to agree to binding arbitration); Del. Code Ann. tit. 19, § 2348A (providing for "nonbinding" mediation of workers' compensation disputes upon the request of "either party"); Ga. Code Ann. tit. 34. appx. (2008) Rules of the State Board of Workers Compensation, Rule 100 (creating an alternative dispute resolution division "to resolve [workers' compensation] disputes without the necessity of a hearing"); Tex. Lab. Code Ann. § 412.035 (requiring workers' compensation board to "develop and implement a policy to encourage the use of . . . appropriate alternative dispute resolution procedure").

[72] *Linda Schouten*, Bd. Dec. No. 07-0248 at 10.

[73] *Id*.

The concept that the board can retroactively suspend a right to compensation runs counter to *Metcalf v. Felec Services.*[74] In that case, the Alaska Supreme Court said that the employer or insurer must petition for the suspension, and it was up to the board to decide to suspend benefits after a hearing was held on the merits of each party's evidence.[75] The Court held that the board cannot retroactively suspend benefits or retroactively ratify an insurer's or employer's unilateral discontinuation of benefits because of an unreasonable refusal to have medical treatment. "The purpose and effect of [this] holding is to give effect to a clear statute requiring that claims of 'unreasonable' refusal be decided by a neutral arbiter before benefits are suspended, as necessitated by the complexity of a 'reasonableness' inquiry."[76] Therefore, assuming the suspension issue is before the board, and that there is substantial evidence to support a finding that Schouten's refusal was unreasonable, an issue the commission does not decide, the board could have suspended Schouten's benefits only as of the date of its order, August 17, 2007, but not as of the date that the employer controverted the claim, July 5, 2006.[77]

6. Conclusion.

The board failed to rule on the issue of whether Schouten was entitled to temporary total disability benefits from July 6, 2006, to the present. It found that Schouten's actions were an unreasonable refusal of medical treatment pursuant to AS 23.30.095(d), but issued an order making both past and future benefits contingent upon her successful completion of a physical therapy program, without formally

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[74] 784 P.2d 1386 (Alaska 1990).

[75] *Id*. at 1388-90.

[76] *Id*. at 1391. The Court has held that the factors to consider in evaluating reasonableness include: "the risk and seriousness of side effects, the chance of cure or improvement, and any first-hand negative experience or observations of the patient, regarding either this procedure or medical care in general." *Id*. at 1388 (*quoting Fluor Alaska, Inc. v. Mendoza*, 616 P.2d 25, 27-29 (Alaska 1980).

[77] The commission's holding that suspension of benefits for refusal of medical treatment under AS 23.30.095(d) is prospective does not affect the board's authority to decide restrospectively that an employee is not otherwise entitled to benefits. The board may not reinstate what it did not first suspend.

suspending future benefits. Because suspension of TTD was not relief the board could grant, the commission VACATES the board's decision and order and REMANDS this case to the board with directions to address the issue of whether Schouten reached medical stability. The board need not hold another hearing before issuing a decision on remand because medical stability was the issue presented to the board by the parties. The commission retains jurisdiction to rule on a motion for attorney fees before the commission, but the commission defers ruling until the board issues a decision on remand.

The commission clerk is directed to return the record to the board for its use in reaching a decision on remand.

Date: *December 5, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen Hagedorn, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision of the commission on this appeal, but this is a not a final administrative agency decision on the employee's claim for workers' compensation. The commission vacated (made void) the board's decision and order and remanded the case to the board to decide the claim. The commission retained jurisdiction to decide a motion for attorney fees. 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 employee's claim.

This decision becomes effective when it is distributed (mailed) by the appeals commission unless proceedings to appeal it are instituted (started). To find the date of distribution, look at the clerk's Certificate of Distribution box below.

Proceedings to appeal must be instituted in the **Alaska Supreme Court** within 30 days of distribution 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 claim, 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 the claim, 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 at the Supreme Court within 10 days after the date of this decision. For more information, contact

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. 094, the decision in the appeal of *Linda Schouten v. Alaska Indus. Hardware & AIG Claims Servs.,* Appeal No.07-036; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *5th* day of *December*, 200*8*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision No. 094 issued in AWCAC Appeal No. 07-036 was mailed on *12/5/08* to C. Coe & C. Smith at their addresses of record and faxed to Coe, Smith, Director WCD, & AWCB Appeals Clerk.

Signed *12/5/08*
J. Ramsey, Deputy Appeals Commission Clerk Date