

Case: *S&W Radiator Shop and Alaska National Insurance Co. vs. Louise Flynn*, Alaska Workers' Comp. App. Comm'n Dec. No. 005 (February 24, 2006)

Facts: Flynn argued that service upon her attorney in the board proceeding is not adequate to join her as a party to an appeal to the commission and that the commission is obligated to serve her directly with notice of the hearing and appeal. She also argued against a stay of payments that the employer sought while it appealed a final board decision on benefits for her future surgery.

Statutes/regulations: AS 23.30.125(c) provides that if a compensation order is "not in accordance with law or fact, the order may be . . . set aside . . . through proceedings in the commission brought by a party in interest *against all other parties to the proceedings before the board.*" 8 AAC 57.020(a) provides that "[a]ll parties before the board when the board decision or order was entered are parties to the appeal." 8 AAC 57.020(c) provides that all parties who did not file an appeal are "appellees, regardless of their status before the board."

8 AAC 57.040 provides that service "upon a party represented by an attorney is upon the attorney unless the chair, panel, or commission orders service upon the party, as well as the attorney."

AS 23.30.125(c). The commission may grant a stay of payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage," AS 23.30.125(c), and that there are "serious and substantial questions going to the merits of the case" and that the injury that would result from the stay can be indemnified by a bond or is relatively slight in comparison to the injury that the party seeking the stay will suffer if it is not granted. *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska, 1992).

Issues: Should Flynn be dismissed from the appeal because she is not a party? Should Flynn be dismissed from the appeal due to a lack of notice? Should the commission grant the stay?

Holding/analysis: Because Flynn was a party to the board proceedings, she is the adverse party to the appeal, the appellee, by operation of law per above statutes and regulations. Second, Flynn had actual notice of the hearing from the employer and apparently from her attorney, and she appeared. Moreover, service on her through her attorney who represented her before the board was appropriate where her attorney had not filed a notice of withdrawal before the board at the time the appeal was filed, her attorney entered a general appearance on her behalf before the commission by writing a letter on her behalf to commission not limiting his representation in any way, and by participating in a phone conference setting the hearing date.

Third, the commission granted the stay. The board's decision addressed payment for a future removal of a screw and plate related to a past fusion of Flynn's left wrist. The balance of hardships tipped in favor of the employer. The hardship to Flynn was less than the employer's because she was not totally disabled, the injury occurred more than 10 years ago, the surgery was non-emergent, she had already received more than

\$30,000 in compensation and the delay that would be suffered while the appeal went forward was “relatively short.” On the other hand, the employer would be unable to recover any payments if the employee decided to undergo the surgery during the appeal, other than withholding from future compensation which is not unlikely to occur, per AS 23.30.155(j) and *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991). In addition the commission found “serious and substantial questions” on the merits because the board made no findings regarding the compensability of the condition for which benefits were sought (even though such evidence might exist in the record).

Notes: Comm’n Dec. No. 016 addresses the merits of this appeal. The commission amended the regulation on stays, 8 AAC 57.100, effective March 24, 2012.