Case: *Fairbanks Memorial Hospital and Harbor Adjustment Service Company vs. State of Alaska, Second Injury Fund,* Alaska Workers' Comp. App. Comm'n Dec. No. 103 (March 18, 2009)

Facts: Joan O'Lone (O'Lone), a nurse, injured her back working for Fairbanks Memorial Hospital (the hospital) on August 6, 2003. Before the injury, O'Lone had undergone surgery for a herniated intervertebral disc in 1993. Dr. Stinson first observed O'Lone might suffer permanent disability in an August 25, 2003, progress note that stated that "we discussed it may not be possible for her to return on an unrestricted status back to working as a nurse." The hospital mailed the Second Injury Fund (SIF) a Notice of Possible Claim on July 7, 2005. The SIF stamped it as received on July 13, 2005.

On May 17, 2007, the hospital claimed reimbursement from the SIF for compensation paid in excess of 104 weeks. The SIF answered, admitting, among other things, that "the petitioner filed a notice of possible claim against the Second Injury Fund within 100 weeks of the August 6, 2003, date of injury." It disputed that the August 2003 injury resulted in a "disability substantially greater than either condition alone" and that O'Lone's continuing disability was the result of "the combined effects of her pre-existing condition with her industrial accident of August 6, 2003." Two days before hearing, the SIF argued in its hearing brief that the SIF was not timely notified of a possible claim. The board nevertheless granted the hospital's reimbursement petition on May 7, 2008. The SIF moved for reconsideration, arguing that the hospital filed its notice of possible claim late six days late because filing is determined not by date of mailing but by date of receipt. The hospital argued that the SIF's answer admitted that the notice was timely received, the hospital had no notice that timeliness was at issue, and the SIF was barred from disputing timeliness without amending its answer. The board reversed its previous decision, and denied the petition for reimbursement as untimely. The hospital appealed.

Applicable law: AS 23.30.205 provides:

> (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 course of 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 . . . shall in the first instance pay all awards of compensation provided by this chapter, but the employer . . . shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.
>
> . . .
>
> (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.

Injury "does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met." *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 594 (Alaska 1996).

In *North Slope Borough v. Second Injury Fund*, Alaska Workers' Comp. App. Comm'n Dec. No. 048, 10 (July 13, 2007), the commission described how the board should approach the 100-week notice period:

> The date of knowledge of an injury for SIF purposes and the date of a possible claim may be the same in many cases. In this case, the Borough's claim is based on the combined effect of the pre-existing lumbar spine arthritis and later the neck and shoulder injury. If the Borough had immediate knowledge of the combined effects, then the 100-week period required by AS 23.30.205(f) ran from the time at which the "combined effects" test is met, concurrent with the existence of a possible claim. The notice period ends no later than 100 weeks from the time the Borough had such knowledge. However, if a possible claim exists but the Borough had no knowledge of an injury for SIF purposes (no knowledge that the combined effects test is met), the Borough's obligation to give notice began with the existence of the possible claim but its opportunity to give notice ends 100 weeks after it knew of the injury for SIF purposes. (Citation omitted.)

While the board may require proof of a fact notwithstanding the failure of a party to deny a fact alleged in a claim under 8 AAC 45.050(c)(1), an affirmative admission to the fact in an answer "remove[s] the fact from contention." *See Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 341 (Alaska 2005).

The Alaska Supreme Court (supreme court) held that the board's authority under AS 23.30.110(a) to hear and determine "all questions in respect to the claim" is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

8 AAC 45.050(c)(3)(B) imposes an affirmative obligation to disclose a defense based on a legal or equitable bar in the answer. 8 AAC 45.050(e) permits liberal amendment "upon such terms as the board . . . directs."

Issues: Was the question of timeliness of filing the reimbursement claim properly before the board? Did the board err in calculating when the statutory 100-week period began?

Holding/analysis: The question of timeliness was not properly before the board because the SIF admitted that the notice was timely filed in its answer to the claim and did not amend its answer. Because the SIF's answer stated that the notice was filed "within 100 weeks of the August 6, 2003 date of injury," it clearly conveyed that the SIF

admitted that notice was given within 100 weeks of the earliest possible date the employer could have had knowledge of the injury. In addition, the SIF was required to assert in its answer if the claim for reimbursement "was otherwise barred by law," but it did not state that the claim was barred because the employer failed to file notice within 100 weeks of employer knowledge. Thus, "[t]he commission concludes that the board erred in deciding whether or not the Hospital filed a timely Notice of Possible Claim against the Fund without giving the parties adequate notice." Dec. No. 103 at 14.

Second, the commission reversed the board's decision that the notice was untimely. The board counted the 100 weeks from August 6, 2003, the date O'Lone was injured at work, instead of following the supreme court's interpretation of AS 23.30.205 in *Arctic Bowl* and the commission's guidance. "Because the board made no finding of fact that the Hospital had *immediate* knowledge of the combined effects test being met, it was error to begin running the 100-week notice period from the date the employee was injured." Dec. No. 103 at 16. Moreover, since the record lacked substantial evidence to support a finding that the hospital knew the work injury would result in substantially greater disability before August 14, 2003, (100 weeks before the notice was filed), the board could not find that the employer's notice of possible claim was untimely. The commission noted that the "earliest possible indication" that O'Lone would suffer "substantially greater disability" was in Dr. Stinson's August 25, 2003, progress note. *Id.* at 17.