Case: *Calvin L. McGahuey vs. Whitestone Logging, Inc. and Alaska Timber Insurance Exchange*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 (August 28, 2007)

Facts: The employee appealed the board's decision dismissing his claim because he failed to provide written notice of an injury under AS 23.30.100. The employee worked for Whitestone Logging on Afognak Island in early 2004. After his job ended, he reported – in 2005 – an injury to his ears and injuries in a 2004 fight. McGahuey filed a claim for compensation benefits related to his injuries from the fight in February 2006, and the employer sought to have the claim dismissed for failure to provide timely written notice.

At hearing, McGahuey testified he injured his lower back and hip in a fight, and that he told his supervisor, John Rivers, about the fight and his injuries the next day. He testified that he was limping after the fight. For the employer, Pamela Scott, the department manager for the insurer, testified that the employer had no knowledge of an injury and she couldn't question other people because they were no longer there. Also, she testified that there was no record of treatment for back pain until after McGahuey worked for another employer in California. The Board concluded

> that the employee unreasonably delayed filing a report of injury. The fighting incident where the injury occurred took place in March 2004 but the employee did not report for treatment of any back condition until December 2005. He also did not file a report of injury until June 8, 2005, which is not within 30 days as required under AS 23.30.100. None of the exceptions set out under this rule are applicable to the employee. The employer's petition to dismiss the claim pursuant to AS 23.30.100 is granted. Dec. No. 054 at 5.

Applicable law: AS 23.30.100(a) provides that: "Notice or an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer."

AS 23.30.100(b) specifies the notice should be written and what the notice needs to include.

AS 23.30.100(d) provides that:

> Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice; . . .

AS 23.30.120(a) provides that "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 . . . (2) sufficient notice of the claim has been given; . . . "

Issues: Did the board properly apply presumption analysis? Does substantial evidence support the board's decision? Did the board make sufficient findings of fact, including credibility determinations?

Holding / analysis: The commission concluded that the board erred because it did not make determinations about the two conditions of AS 23.30.100(d)(1) in order to support its conclusion that the AS 23.30.100(d) exceptions did not apply. The commission found that the board did not make any findings about McGahuey's credibility and McGahuey's testimony that he told Rivers about the fight and that he was injured, and that he was visibly limping, was sufficient evidence to demonstrate that the employer knew about the injury, the first condition of AS 23.30.100(d)(1).

On the second element, an employer is prejudiced when the failure to give timely notice either impedes the employer's ability to provide immediate medical diagnosis and treatment to minimize the seriousness of the injury or impedes the earliest possible investigation of the facts surrounding the injury. *Dafermo v. Municipality of Anchorage,* 941 P.2d 114, 118 (Alaska 1997). In McGahuey's case, the board had no evidence whether the delay in written notice impeded immediate medical diagnosis and treatment or whether the employee did not suffer an injury or symptoms sufficient to require treatment. In addition, although employer's insurance agent testified that she couldn't question people who were no longer there, it was unclear whether the delay in giving written notice, rather than the passage of time between the injury and the claim, impeded the employer's ability to investigate. Also, the insurer's 2005 controversion stated that "Mr. Rivers had investigated the incident at or near the date that it had occurred."

Lastly, the board needed to apply the presumption of sufficient notice, making specific findings regarding the raising and rebuttal of the presumption, similar to the process that it engages in when it applies the presumption of compensability. *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 356 (Alaska 1992).

The Board did not make sufficient findings of fact and the commission cannot fill in the gaps by making its own findings, *S&W Radiator Shop v. Flynn,* Alaska Workers Comp. App. Comm'n Dec. No. 016, 14 (August 4, 2006). So, the commission remanded.

Note: Dec. No. 118 (October 23, 2009) affirms the board decision made after remand.