Case: *Sourdough Express, Inc. and Alaska National Insurance Co. vs. Darrell Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (February 7, 2008)

Facts: Sourdough Express appealed the board's decision rejecting its statute of limitations defenses. The board concluded that the employer's controversion filed in 1999 was invalid and therefore, the two-year period to request a hearing was not triggered and so the employee's claim could proceed to hearing. On another claim, the board concluded that the employee's injury was latent and so the employee did not file his 2004 claim too late.

Applicable law: AS 23.30.110(c) states: "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied."

AS 23.30.105(a) states in part: "The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement." In *Egemo v. Egemo Constr. Co.,* 998 P.2d 434, 440 (Alaska 2000), the Alaska Supreme Court emphasized that "both the knowledge [of the nature of the injury and its relationship to employment] and the disablement must be conjoined before the employee is required to file a claim."

The Alaska Supreme Court's ruling that an injury is latent if, in the exercise of reasonable diligence a claimant would not have come to know of the injury's existence, reflects the concern that the claimant not sleep on his rights, but exercise "reasonable diligence (taking into account his education, intelligence, and experience)." *Aleck v. Delvo Plastics, Inc.,* 972 P.2d 988, 991 (Alaska 1999). AS 23.30.120(b) provides that, if the board excuses the delay in giving notice of injury under AS 23.30.100(d)(2), the employee does not enjoy the presumption of compensability, which moderates the impact of the employer's lost opportunity to investigate or mitigate an injury and leaves the employer and claimant equally disadvantaged in proving, or refuting, the claim.

Issues: What must a controversion include in order to trigger the running of the AS 23.30.110(c) time-bar? Was Barron's 2004 claim filed on time, given that he knew he had degenerative disc disease and he stopped working for the employer in 1998 but he only discovered the disc protrusion in 2003 and the annular tear in 2005?

Holding/analysis: The commission vacated the board's order dismissing the petition to dismiss the 1999 claim for benefits and remanded to the board for rehearing and specific findings of fact. The commission instructed the board to decide if the employer filed a facially valid formal controversion and if the employee filed a request for hearing within two years. If not, the employee, to avoid dismissal of his 1999 claim for benefits, must establish that failure to file a request for hearing is excused because the controversion was filed in bad faith.

In *Barron*, the commission concluded that board erred in requiring the record to contain evidence to support a controversion at the time it was filed. Instead, the relevant inquiry is whether "the employer or its agents had in their possession or control

evidence that, standing alone and without weighing its credibility, would support a controversion of the claim when it was filed." Dec. No. 069 at 17 (emphasis omitted).

The commission rejected Barron's argument that an employer medical evaluation was required to support a controversion; instead, what is required for a valid controversion is "conflicting medical evidence." The commission distinguished Barron's circumstances from those in *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352 (Alaska 1992). In *Harp*, the only "conflicting" evidence was that the employee had no medical authorization of continuing disability. However, this was insufficient to support a controversion because she was not required to provide updates on her condition and she had not returned to work. (Harp was injured in 1987, so the 1988 amendments establishing a presumption of medical stability in AS 23.30.395(27) and the amendment of AS 23.30.185 did not apply to Harp's claim.)

> Barron, on the other hand, had been released to return to work – and in fact returned to work – after his February 1998 injury, held himself out as able to work in order to collect unemployment insurance benefits later in 1998, had reported he "slipped a disc" years earlier, continued to report the slipped disc as the source of his back pain to his physicians, and sought treatment due to onset of sharp pain for two weeks in December 1998, more than half a year after he stopped working for Sourdough Express. Dec. No. 069 at 19-20.

The commission placed the burden of establishing that a controversion was filed in bad faith on the employee.

> If, after drawing all permissible inferences from the evidence in favor of a facially valid formal controversion, the board finds that it lacks *any* legal basis or that it was *designed* to mislead or deceive the employee, the board may find that it was a bad faith controversion that does not begin the time-bar in AS 23.30.110(c). *Id.* at 21-22.

But the commission cautioned that not all controversions that are based on evidence later found insufficient and subject to a Harp penalty under AS 23.30.155(e) are filed in bad faith:

> Between good faith and bad faith, there is a borderland inhabited by honest mistakes, inadvertent processing errors, and petty misunderstandings that may subject the employer to a penalty, but are not the result of bad-faith conduct. Failure to file "in good faith" does not prove that the employer acted in "bad faith." The Supreme Court has had occasion to distinguish between frivolous claims and bad-faith conduct, finding that a claim may be frivolous but not brought in "bad faith." Bad-faith conduct implies more than partial or technical insufficiency, error or negligence. An employer may have sufficient evidence that supports controversion of part of the claim, but read the evidence as supporting controversion of the entire claim, may make typographical errors, or have

> reasonably misunderstood the nature of the employee's claim in framing a controversion. Dec. No. 069 at 20-21 (footnotes omitted).

On the 2004 claim, the commission concluded that "a work-related aggravation of a progressive condition may result in a latent injury." *Id.* at 1-2. The commission concluded that Barron's claim is a claim that his working conditions, rather than a specific injury, led to a worsening of his back condition, resulting in a disc protrusion and annular tear. The commission concluded that the board could choose to infer that, although Barron was aware of his degenerative disc disease and muscle strains, he was unaware of the specific extent of his injuries until December 2003 for the disc protrusion and February 2005 for the annular tear. Thus, Barron's claim filed in 2004 was timely because it was filed within two years of his knowledge of the nature and extent of his injuries and their relationship to his working conditions. The board disallowed any of Barron's claims for compensation based on degenerative disc disease and muscle spasm or strain.

The commission concluded the board acted within its discretion in permitting the 2004 claim to be amended to conform to the evidence. "Although the board characterized its finding of the 2005 'annular tear' as a 'latent injury,' we believe that it is rather a case of the board amending the 'cumulative injury' claim to conform to later developed evidence, since that injury, not known at the time the claim was filed, could not have been a discovered 'latent' injury." *Id.* at 27.

The commission remanded so that the board could decide the merits of Barron's claim. "We caution that the relevant inquiry in deciding the merits of the claim is still whether the employee's work, which ended in 1998, was a substantial factor in bringing about the newly discovered injury, notwithstanding the intervening years." *Id.* at 2.

Note: Dec. No. 028 (Jan. 17, 2007) granted the motion for extraordinary review to hear this appeal.

Note: The supreme court stated in *Harris v. M-K Rivers*, ___ P.3d ___ (Alaska, March 14, 2014) that "*Harp* does not require an inquiry into the motives of the author," thus questioning the commission's statement in *Sourdough* that bad faith means lacking in any legal basis or designed to mislead or deceive.