Alaska Workers' Compensation Appeals Commission

Tracy O. Atkins, Appellant, vs. Inlet Transportation & Taxi Service, Inc. and State of Alaska, Workers' Compensation Benefits Guaranty Fund, Appellees.	Final Decision Decision No. 229 September 26, 2016 AWCAC Appeal No. 14-011 AWCB Decision Nos. 14-0045 and 16-0004 AWCB Case No. 200920434

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0045, issued at Anchorage, Alaska, on March 28, 2014, by southcentral panel members Margaret Scott, Chair, and Rick Traini, Member for Labor; and, Final Decision and Order on Remand No. 16-0004, issued at Anchorage, Alaska, on January 6, 2016, by southcentral panel members Margaret Scott, Chair, Amy Steele, Member for Industry, and Mark Talbert, Member for Labor.

Appearances: Eric Croft, The Croft Law Office, for appellant, Tracy O. Atkins; Jahna Lindemuth, Attorney General, and Siobhan McIntyre, Assistant Attorney General, for appellee, State of Alaska, Workers' Compensation Benefits Guaranty Fund; appellee, Inlet Transportation & Taxi Service, Inc., did not participate.

Commission proceedings: Appeal filed April 28, 2014; briefing completed January 22, 2015; oral argument held April 9, 2015; Memorandum and Order Remanding Case issued July 16, 2015; appeal amended January 14, 2016; briefing completed May 23, 2016; oral argument held June 29, 2016.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

Tracy Atkins filed a claim for workers' compensation benefits and subsequently settled his third party claims without the written approval of his uninsured employer.

The Workers' Compensation Benefits Guaranty Fund (Fund) filed a petition to dismiss the claim against the Fund, on the grounds that (1) because Mr. Atkins had settled his third party claims without the employer's written approval, the employer was discharged from liability for compensation pursuant to AS 23.30.015(h), and (2) because Mr. Atkins had not filed an affidavit of readiness for hearing within two years of the Fund's notice of controversion, the claim was time barred pursuant to AS 23.30.110(c).

The Alaska Workers' Compensation Board (Board) granted the petition based on AS 23.30.015(h),[1] and Mr. Atkins appealed. We remanded the case, and on remand the Board ruled that Mr. Atkins' claim was time-barred pursuant to AS 23.30.110(c).[2]

We conclude that the Board erred in ruling that Mr. Atkins' claim is time-barred under AS 23.30.110(c), but that it correctly concluded that his employer's liability is discharged pursuant to AS 23.30.015(h).

2. Factual Background and Proceedings.[3]

Tracy Atkins was a taxi driver for Inlet Transportation & Taxi Service, Inc. (Inlet Taxi), an uninsured employer.[4] There is no evidence of a written contract covering his employment with Inlet Taxi.[5] On September 6, 2009, Mr. Atkins was seriously injured

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[1] *Tracy O. Atkins v. Inlet Transportation & Taxi Service, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 14-0045 (Mar. 28, 2014).

[2] *Tracy O. Atkins v. Inlet Transportation & Taxi Service, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 16-0004 (Jan. 6, 2016).

[3] We make no factual findings. We state the facts as set forth in the Board's decision, adding context and detail by reference to the record. Information regarding the proceedings before the Board is set forth as it appears in the record.

[4] *See Atkins*, Bd. Dec. No. 14-0045, p. 2 (No. 1). For purposes of this decision, Mr. Atkins' status as a covered employee is not in dispute. *Atkins*, Bd. Dec. No. 16-0004, p. 3 (No. 5). *See* Hr'g Tr. at 13:2 – 14:18, Mar. 12, 2014 (*hereinafter*, 2014 Tr.). However, Inlet Taxi's position, as expressed by Mr. Altman, was that Mr. Atkins was not an employee. *See* 2014 Tr. at 68:3-7.

[5] Mr. Atkins testified that no such contract exists. *See* 2014 Tr. at 16:2-7, 68:3-7; Hr'g Tr. at 45:16 – 46:6, Dec. 9, 2015 (*hereinafter*, 2015 Tr.).

when his cab was in a head on collision caused by the driver of another vehicle, Jeffrey Vincent, who died at the scene.[6]

Mr. Atkins had been hired a month or two before the accident by Michael J. Kinslow, a former driver for Inlet Taxi, who told Mr. Atkins that he was buying the business.[7] However, at the time of the accident Robert L. Roper was the president and 100% owner of Inlet Taxi.[8] After the accident, Brian Jay Altman, the firm's vice president,[9] purchased 50% of the business.[10]

For a few months after the accident, due to his injuries and personal circumstances, Mr. Atkins was unable to deal with his legal situation.[11] After several months, he contacted Joseph Kalamarides, an attorney experienced in workers' compensation proceedings.[12] On January 25, 2010, Mr. Kalamarides wrote Mr. Atkins a letter declining to represent him and responding to Mr. Atkins' inquiry regarding whether taxi drivers are covered by the Alaska Workers' Compensation Act (Act). Mr. Kalamarides answered that in his opinion, they are not, quoting AS 23.30.230(7) and AS 23.10.055(a)(13), and stating "[i]t appears that you may fit that situation, except that you did not have a written contract." He added:

> If you file a workers' compensation report or [sic] injury or claim, you may need to know that any resolution with the liability carriers in the accident have [sic] to be done with the written agreement of the workers' compensation carrier as they may have a lien on those proceeds.

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6 *See Atkins*, Bd. Dec. No. 14-0045, p. 2 (No. 1).

7 *See* Tracy O. Atkins Dep., Feb. 12, 2014, 21:6-10; R. 267.

8 R. 24.

9 R. 25. Mr. Altman testified that he was added as vice president and a director in 2008. 2014 Tr. at 69:20 – 70:12.

10 R. 23.

11 *See* 2014 Tr. at 36:18 – 37:11, 110:10-17, 138:25 – 139:17. Mr. Atkins sustained fractures to his foot, right knee, and left hip, as well as injuring his eye and head. His medical bills exceeded $165,000. *See* R. 273-274; 283, 397; 2014 Tr. at 31:15-19, 47:15-22.

12 *See* 2014 Tr. at 37:5 – 38:3.

> AS 23.30.015. You need to get this permission even if they are contesting your right to have workers' compensation benefits.[13]

On April 8, 2011, Mr. Atkins, who was not represented by counsel for purposes of workers' compensation benefits, filed a report of injury[14] and on April 19, 2011, a claim for workers' compensation benefits requesting joinder of the Fund under AS 23.30.082.[15]

Shortly before he filed his claim for workers' compensation benefits, Mr. Atkins had retained an attorney, Stuart Cameron Rader, to represent him in a civil claim against Jeffrey Vincent.[16] Mr. Rader attempted to contact Mr. Roper, seeking information regarding Inlet Taxi's insurance coverage and the firm's assistance in the third party claim against Mr. Vincent.[17] He received no response from Mr. Roper, but he did communicate with an adjuster for Inlet Taxi's commercial liability or automobile insurer.[18]

On May 5, 2011, Mr. Atkins released all his claims against Jeffrey Vincent and his father, Warren Vincent, for a total of $119,668.64, to be paid by Inlet Taxi's commercial insurance carrier.[19] Mr. Rader was unfamiliar with the requirement for employer approval of third party claims in order to retain the right to workers' compensation benefits.[20] Neither Mr. Rader nor Mr. Atkins obtained the written approval of Inlet Taxi for the third party settlements.[21]

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[13] *Atkins*, Bd. Dec. 14-0045, p. 2 (No. 2). *See* R. 145-146. The letter did not state that the failure to obtain consent would result in forfeiture of the claim.

[14] R. 1.

[15] *See Atkins*, Bd. Dec. No. 14-0045, p. 2 (No. 3); R. 1, 4-5.

[16] *See* R. 50; 2014 Tr. at 101:11-14.

[17] *See* 2014 Tr. at 80:2-14.

[18] *See* 2014 Tr. at 80:15 – 83:10, 85:9-23.

[19] *Atkins*, Bd. Dec. No. 14-0045, pp. 2-3 (No. 4). *See* 2014 Tr. at 83:3-10.

[20] *See Atkins*, Bd. Dec. No. 14-0045, p. 4 (No. 16); 2014 Tr. at 79:3-18, 87:3-22.

[21] *See* R. 50-55; 2014 Tr. at 52:2-5, 113:16 – 114:1; 2015 Tr. at 66:23 – 67:25.

On May 9, 2011, the Fund controverted Mr. Atkins' workers' compensation claim on the grounds that (1) Mr. Atkins was not covered by the Act, pursuant to AS 23.30.230(a)(7), and (2) he had been treated for lumbar pain after a slip and fall on ice on February 14, 2011.[22] At the time it controverted the claim, the Fund had no evidence that there was a written contract in place between Mr. Atkins and Inlet Taxi that exempted him from coverage under the Act.[23] On May 16, 2011, an adjuster for the Fund interviewed Mr. Atkins; Mr. Atkins stated that he was paid from the fares he earned, with $45 per day going to Inlet Taxi. He added that he could "go anywhere" and that he "[n]ormally [worked] from six in the evening until . . . six in the morning."[24] He said that his attorney, Mr. Rader, was "working on" a settlement for the insurance policy limits.[25]

On June 27, 2011, the Fund filed a petition to join Inlet Taxi's corporate officers. An initial prehearing conference was conducted on July 7, 2011. Inlet Taxi did not participate; Mr. Altman contacted the Board prior to the hearing and stated the firm would not be participating on the ground that in its view Mr. Atkins was not its employee.[26] Following the prehearing conference, the Board gave notice of intent to join the listed corporate officers (including Mr. Roper and Mr. Altman) as well as Mr. Kinslow.[27]

At a second prehearing conference on August 9, 2011, the parties were informed of the third party settlements.[28] Following the conference, the corporate officers and

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[22] *Atkins*, Bd. Dec. No. 16-0004, p. 3 (No. 4). *See* R. 2; 2014 Tr. at 57:7-13.

[23] At oral argument, the Fund conceded that it had no evidence that a written contract existed.

[24] R. 169-171.

[25] *See* R. 185-186.

[26] R. 198.

[27] R. 199.

[28] R. 204. Prior to the prehearing teleconference, the Fund was not aware that the claim had been settled. *See* 2014 Tr. 50:1-8.

Mr. Kinslow were added as parties.[29] The Fund's adjuster contacted Mr. Vincent's insurer on October 20, 2011, and informed it of Mr. Atkin's workers' compensation claim.[30] On October 27, 2011, the Fund controverted the claim based on AS 23.30.015(g) and (h), asserting that Mr. Atkins had settled his third party claims.[31]

On August 24, 2012, Mr. Atkins called the Board and spoke with Peggy Helgeson, a Division employee, regarding the status of his claim.[32] He again spoke about the status of his claim, this time with another Division employee, Cynthia Stewart, on August 7, 2013.[33] On September 2, 2013, Mr. Atkins again spoke with Ms. Stewart, who informed him that "his deadline [for filing an affidavit of readiness] was coming up."[34] At a prehearing conference on October 14, 2013, the parties discussed the deadline for filing an affidavit of readiness for hearing.[35] Mr. Atkins stated that he had been informed by Division staff that the deadline was October 27, 2013.[36] On October 24, 2013, Mr. Atkins filed an affidavit of readiness for hearing.[37]

On December 2, 2013, the Fund filed a petition to dismiss the claim against the Fund, on the grounds that (1) because Mr. Atkins had settled his claim against

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[29] R. 204.

[30] 2014 Tr. at 51:8-17. The Fund's adjuster testified she was told that the insurer was previously unaware of Mr. Atkins' workers' compensation claim and that the insurer would not have settled the third party claim if it had known of the workers' compensation claim.

[31] *Atkins*, Bd. Dec. No. 16-0004, p. 4 (No. 9). *See* R. 3. The controversion was effective the date it was filed. *See* AS 23.30.155(a).

[32] *Atkins*, Bd. Dec. No. 16-0004, p. 4 (No. 10).

[33] *Atkins*, Bd. Dec. No. 16-0004, p. 5 (No. 12).

[34] *Atkins*, Bd. Dec. No. 16-0004, p. 5 (No. 13). *See Atkins*, Bd. Dec. No. 14-0045, p. 3 (No. 10).

[35] *Atkins*, Bd. Dec. No. 16-0004, p. 5 (No. 14). *See Atkins*, Bd. Dec. No. 14-0045, p. 3 (No. 11).

[36] *Id.* Mr. Atkins has denied stating that he had been told the deadline was "after May 9, 2013" (as compared with "on October 27, 2013"). *See Atkins*, Bd. Dec. No. 16-0004, p. 6 (No. 17); *Atkins*, Bd. Dec. No. 14-0045, p. 4 (No. 14).

[37] *Atkins*, Bd. Dec. No. 14-0045, p. 3 (No. 12); *Atkins*, Bd. Dec. No. 16-0004, p. 5 (No. 15). *See* R. 42.

Mr. Vincent without the employer's written approval, the employer was discharged from liability for compensation pursuant to AS 23.30.015(h), and (2) because Mr. Atkins had not filed an affidavit of readiness for hearing within two years of the Fund's May 9, 2011, notice of controversion, the claim was time barred pursuant to AS 23.30.110(c).[38]

The Board conducted a hearing on those two issues.[39] The Board issued a decision granting the petition based on AS 23.30.015(h). Mr. Atkins appealed, and we remanded the case to the Board "for further proceedings and factual findings to address Mr. Atkins' equitable arguments, and for additional findings to address the Fund's asserted defense under AS 23.30.110(c)."[40] The Board issued a decision on remand, declining to address Mr. Atkin's equitable defenses[41] and concluding that Mr. Atkins' claim was barred by AS 23.30.110(c).

3. Standard of Review.

On appeal, Mr. Atkins raises two issues for our consideration: (1) whether the Board erred in concluding that his claim was barred by AS 23.30.015(h), and (2) whether the Board erred in concluding that his claim was barred by AS 23.30.110(c). We must uphold the Board's factual findings relevant to the

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[38] *Atkins*, Bd. Dec. No. 14-0045, pp. 3-4 (No. 13); *Atkins*, Bd. Dec. No. 16-0004, pp. 5-6 (No. 16). *See* R. 49-58.

[39] The Fund had also controverted Mr. Atkins' claim on the ground that he had failed to timely report the injury, but it chose not to bring that issue before the Board at the March 12, 2014, hearing. *See* AS 23.30.100; 2014 Tr. at 11:5-12.

[40] Memorandum and Order Remanding Case, p. 5 (July 16, 2015).

[41] *See Atkins*, Bd. Dec. No. 16-0004, pp. 11, 22. Our specific instruction to the Board, set forth in our order of remand, was as quoted. In our memorandum accompanying the order we stated: "Mr. Atkins' argument relating to AS 23.30.015(h) need not be considered at all, if his claim is otherwise barred by AS 23.30.110(c)". Memorandum and Order Remanding Case, p. 4. This statement, included in a paragraph discussing our view of the issues in the case as presented to us on appeal, was intended to communicate that it would not be necessary for <u>us</u> to address the applicability of AS 23.30.015(h) if the claim was otherwise barred by AS 23.30.110(c). The Board apparently misconstrued our statement as an invitation for the Board to disregard Mr. Atkins' equitable arguments on remand if it concluded that the claim was barred by AS 23.30.110(c), notwithstanding the wording of our order of remand. *See Atkins*, Bd. Dec. No. 16-0004, p. 11 (No. 27).

application of these two statutes if they are supported by substantial evidence in light of the whole record.[42] In this case, Mr. Atkins has not asserted that any of the facts as found by the Board lack substantial support in the evidence. On any given set of facts, determining whether a claim is barred by AS 23.30.015(h) or AS 23.30.0110(c) is a question of law.[43] On questions of law, we do not defer to the Board's conclusions. We exercise our independent judgment.[44]

4. Discussion.

On appeal, Mr. Atkins argues that (1) the defense stated in AS 23.30.015(h) as a matter of law does not apply to an uninsured employer[45] and, in the alternative, that (2) under the facts of this case, Inlet Taxi (a) waived[46] or (b) is equitably barred from asserting that defense.[47] He also argues that (3) Mr. Atkins had substantially complied with the provisions of AS 23.30.015(h) by attempting to contact Mr. Roper and obtaining a policy limits settlement.[48] Lastly, he argues that (4) AS 23.30.015(h)

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[42] AS 23.30.128(b).

[43] *See*, *e.g.*, *Seville v. Holland America Line Westours, Inc.*, 977 P.2d 103, 105 (Alaska 1999); *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 289, n. 1 (Alaska 1991); *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1148 (Alaska 1989); *M-K Rivers v. Schleifman*, 599 P.2d 132, 134 (Alaska 1979).

[44] AS 23.30.128(b).

[45] *See* Appellant's Brief, p. 8 ("Mr. Atkins submits that an uninsured employer should not be allowed certain . . . defenses under the Act, including the protection of the tort settlement provision.").

[46] *See* Appellant's Brief, p. 8 ("The Board should have held that all allegations in Mr. Atkins' claim . . . were admitted and that the defenses of the employer parties were waived.").

[47] *See* Appellant's Brief, p. 9 ("Under equitable principles, including 'unclean hands', equitable estoppel, and others, the Board should have denied the employer parties the use of the tort settlement defense in the present case.").

[48] *See* Appellant's Brief, p. 11.

applies only when the settlement prejudices the employer, and under the facts of this case the employer was not financially prejudiced.[49]

In response, the Fund argues that (1) AS 23.30.015(h) does not contain an express exception for uninsured employers, and none should be implied;[50] (2) the equitable doctrine of unclean hands[51] does not apply to Inlet Taxi (because Inlet Taxi's conduct did not cause Mr. Atkins' failure to obtain its written approval) or to the Fund (because the Fund did not engage in wrongful conduct);[52] and (3) Mr. Atkins did not substantially comply with AS 23.30.015(h).[53] The Fund also argues that (4) AS 23.30.015(h) applies without regard to whether the employer was actually prejudiced.[54]

With respect to AS 23.30.110(c), on appeal Mr. Atkins argues that: (1) the Fund's initial controversion lacks an adequate legal or factual basis and is therefore invalid to begin the time for filing an affidavit of readiness for hearing as a matter of law;[55] (2) Mr. Atkins reasonably believed that the deadline for filing an affidavit of readiness was October 26 or 27, 2011, and to the extent the Board found otherwise there is not substantial evidence to support its finding;[56] and (3) substantial compliance with the filing requirement suffices, and Mr. Atkins substantially complied.[57]

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[49] Appellant's Reply Brief, pp. 2-6; Appellant's 2d Brief, pp. 8-13; Appellant's 2d Reply Brief, p. 11.

[50] Appellee's Brief, pp. 12-13.

[51] The Fund did not address the doctrine of equitable estoppel, on the grounds that (a) the doctrine is inapplicable to AS 23.30.015(h) because prejudice to the employer is presumed and (b) Mr. Atkin's brief did not address it. *See* Appellee's Brief, pp. 13-14, notes 6-7.

[52] Appellee's Brief, pp. 13-16.

[53] Appellee's Brief, pp. 16-17.

[54] *See* Appellee's Brief, p. 10 citing, *e.g.*, *Bell v. O'Hearne*, 284 F.2d 777, 780 (4th Cir. 1960); Appellee's 2d Brief, pp. 26-31.

[55] Appellant's 2d Brief, pp. 13-14; Appellant's 2d Reply Brief, pp. 5-7.

[56] Appellant's 2d Brief, pp. 14-15; Appellant's 2d Reply Brief, pp. 7-11.

[57] Appellant's 2d Brief, pp. 15-16.

Additionally, Mr. Atkins argues that (4) as a matter of law, when multiple controversions are filed the time for filing runs from the last controversion.[58]

With regard to AS 23.30.110(c), the Fund argues that (1) the initial controversion was valid to begin the time for filing an affidavit of readiness for hearing because it "is supported by sufficient evidence and colorable legal arguments";[59] and (2) Mr. Atkins' reasonable belief that he timely filed is immaterial, because there are only three accepted legal excuses for the failure to timely file (mental incompetence, lack of proper notice, or Board failure to provide appropriate information), and there is substantial evidence that none of those excuses applies.[60] The Fund asserts that (3) Mr. Atkins did not substantially comply with AS 23.30.015(h),[61] and it takes the position that (4) as a matter of law, when there are multiple controversions the time for filing runs from the first valid controversion.[62]

a. Mr. Atkins' Claim is Not Barred by AS 23.30.110(c).

We turn first to the question whether Mr. Atkins' claim is barred by AS 23.30.110(c). To answer this question, we must initially determine the date on which the time for requesting a hearing began to run. Generally, a hearing must be requested within two years of the date the benefits in question were controverted.[63] However, in order to start the time for requesting a hearing, the controversion must be filed in good faith.[64] The validity of the controversion is determined based on the

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[58] Appellant's 2d Reply Brief, pp. 4-5. This argument is responsive to the Fund's position, stated in its brief, that the time for filing ran from the first valid controversion. *See* Appellee's 2d Brief, pp. 12-13.

[59] Appellee's 2d Brief, pp. 22-25.

[60] Appellee's 2d Brief, pp. 16-22.

[61] Appellee's 2d Brief, p. 22.

[62] *See* Appellee's 2d Brief, pp. 12-13.

[63] AS 23.30.110(c). ("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.").

[64] *See Sourdough Express, Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 at 21-22 (Feb. 7, 2008).

evidence in the possession of the party filing the controversion at the time the controversion is mailed.[65] To qualify as a good faith controversion, the controversion must be supported by evidence that is sufficient, viewed in isolation, to rebut the presumption of compensability with respect to the claimed benefit and to support denial if no contrary evidence were introduced.[66]

The Fund first filed a notice of controversion on May 11, 2011. The sole basis for that controversion (apart from any compensation attributable to a slip and fall on February 14, 2011) was the purported applicability of AS 23.30.230(a)(7),[67] which exempts from coverage:

> an individual who drives a taxicab whose compensation and written contractual arrangement is as described as in AS 23.10.055(a)(13),[68] unless the hours worked by the individual or the areas in which the individual may work are restricted except to comply with local ordinances[.]

Clearly, an individual's status as a taxi driver, by itself, does not establish the existence of the exemption stated in AS 23.30.230(a)(7): a taxi driver's terms of compensation and hours and areas worked must be as stated, in order for the statutory exemption to apply. Accordingly, status as a taxi driver is, as a matter of law, insufficient to support a controversion based on AS 23.30.230(a)(7): the employer

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[65] *See Kinley's Restaurant & Bar v. Gurnett*, Alaska Workers' Comp. App. Comm'n Dec. No. 121 at 16-17 (Nov. 24, 2009).

[66] *See Municipality of Anchorage v. Monfore*, Alaska Workers' Comp. App. Comm'n Dec. No. 081 at 19 (June 18, 2008).

[67] *See* 2014 Tr. at 57:10-13.

[68] AS 23.10.055(a)(13) largely replicates AS 23.30.230(a)(7). It exempts coverage from the Alaska Wage and Hour Act (AS 23.10.050-.150):

> an individual who drives a taxicab, is compensated for taxicab services exclusively by customers of the service, whose written contractual arrangements with owners of taxicab vehicles, taxicab permits, or radio dispatch services are based upon flat contractual rates and not based on a percentage share of the individual's receipts from customers, and whose written contract . . . specifically provides that the contract places no restrictions on hours worked by the individual or on areas in which the individual may work except to comply with local ordinances[.]

must have some evidence that the taxi driver's compensation and hours and areas of service fall within the scope of AS 23.30.230(a)(7) and AS 23.10.055(a)(13).

In this case, there is no evidence in the record that at the time it controverted Mr. Atkins' claim the Fund had in its possession any information regarding the nature of Mr. Atkins' compensation or contractual arrangement with Inlet Taxi.[69] More specifically, on May 11, 2011, as far as we can glean from the record, the Fund had no evidence in its possession from which it could be inferred that Mr. Atkins' compensation and contractual arrangement were as specified in AS 23.30.230(a)(7) and AS 23.10.055(a)(13).[70] Absent any such evidence, the May 11, 2011, controversion was invalid to the extent it was based on the purported applicability of AS 23.30.230(a)(7).[71] Accordingly, that controversion did not begin the time for filing an affidavit of readiness.[72]

b. AS 23.30.015(h) Applies to Uninsured Employers.

We next consider Mr. Atkins' argument that the defense stated in AS 23.30.015(h) as a matter of law does not apply to an uninsured employer.[73] Mr. Atkins has not provided any textual analysis or legislative history to support this

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[69] On May 11, 2011, the Fund filed an answer to the claim stating that it was "unclear" whether Mr. Atkins was an employee of Inlet Taxi. R. 8. The Fund did not identify any evidence in its possession relevant to such a determination. *Id.*

[70] When the Fund interviewed Mr. Atkins on May 16, 2011, he stated that he normally worked from six p.m. to six a.m. R. 169. That statement does not establish that his working hours were unrestricted, as is required under AS 23.30.230(a)(7).

[71] It is apparent, and the Fund has not argued to the contrary, that the May 11, 2011, controversion is invalid with respect to compensation payable prior to the February 14, 2011, slip and fall. While the May 11, 2011, controversion may be valid with respect to benefits payable after the date of the slip and fall insofar as they are the result of that fall, the extent to which the slip and fall was the substantial cause of his compensable injuries remains to be determined.

[72] Because the May 11, 2011, controversion was ineffective to start the time for requesting a hearing, it is not necessary for us to consider Mr. Atkins' other arguments regarding the timeliness issue.

[73] *See* Appellant's Brief, p. 8 ("Mr. Atkins submits that an uninsured employer should not be allowed certain . . . defenses under the Act, including the protection of the tort settlement provision.").

argument, nor do we perceive any. We note that several provisions of the Act expressly differentiate an uninsured employer from an insured employer with respect to liability under other law[74] as well as under the Act,[75] but AS 23.30.015(h) is not one of those provisions. We are constrained to apply the Act as it is written, and we will not imply an exception to the application of the Act as written absent any ambiguity in the text or any legislative history to support one.[76] Accordingly, we reject Mr. Atkins' argument that AS 23.30.015(h) is inapplicable to an uninsured employer.

c. Mr. Atkins Did Not Establish an Equitable Bar to AS 23.30.015(h).

That AS 23.30.015(h) applies to uninsured employers just as much as to an insured employer does not mean that the defense cannot be waived or that a particular employer cannot be equitably barred to assert it. Mr. Atkins has raised several objections to the application of AS 23.30.015(h) to Inlet Taxi that are dependent on equitable principles rather than its status as an uninsured employer.

(1) Waiver.

First, Mr. Atkins argues that Inlet Taxi waived the defense by failing to participate in the proceedings.[77] Because Inlet Taxi failed to timely file an answer asserting that defense, he argues, all of the allegations in Mr. Atkins' claim should be deemed admitted pursuant to 8 AAC 45.050(c)(1).[78] This Board states:

> An answer to a claim for benefits must be filed within 20 days after the date of service of the claim and must be served upon all parties. A

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[74] *See* AS 23.30.045(a); AS 23.30.055; AS 23.30.080.

[75] *See* AS 23.30.075(b); AS 23.30.255(b).

[76] *See*, *e.g.*, *Bartee v. Chugach Electric Association*, Alaska Workers' Comp. App. Comm'n Dec. No. 221 at 7 (Dec. 24, 2015), citing *Konecky v. Camco Wireline, Inc.*, 920 P.2d 277, 280 (Alaska 1996). That AS 23.30.015(h) is silent with respect to an exception for uninsured employers does not mean that it is ambiguous. *See Henrichs v. Chugach Alaska Corporation*, 260 P.3d 1036, 1041 (Alaska 2011).

[77] *See* Appellant's Brief, p. 8 ("The Board should have held that all allegations in Mr. Atkins' claim . . . were admitted and that the defenses of the employer parties were waived.").

[78] *Id.*

> default will not be entered for failure to answer, but, unless an answer is timely filed, statements made in the claim will be deemed admitted. The failure of a party to deny a fact alleged in a claim does not preclude the board from requiring proof of the fact.

Under this regulation, the failure to file an answer is not equivalent to a default, but all statements made in the claim are deemed admitted. The regulation's additional admonition (that the failure to deny a fact alleged in a claim does not preclude the Board from requiring proof) applies when a timely answer has been filed: under 8 AAC 45.050(c)(1) the Board will not require a claimant to prove the facts alleged in a claim, absent an answer.

In this case, Inlet Taxi's failure to file an answer did not in itself waive the defense stated in AS 23.30.015(h): 8 AAC 45.050(c)(1) provides that the failure to file an answer is not a default (forfeiture), much less a waiver (intentional relinquishment) of any defenses. Moreover, that all of the factual allegations stated in Mr. Atkins' claim are deemed admitted does not mean that Inlet Taxi cannot rely on AS 23.30.015(h) as a defense. The factual allegations made in Mr. Atkins' claim include that Inlet Taxi was Mr. Atkins' employer (without specifying any fact pertinent to that status), that he incurred various injuries, and the date and circumstances ("Head On 'MVA'") of the accident from which they resulted, but not that Inlet Taxi had consented to his settlement with a third party or any other facts pertinent to AS 23.30.015(h).

(2) Equitable Bars.

Mr. Atkins argues that Inlet Taxi is equitably barred from asserting the defense of AS 23.30.015(h), referring generally to the principles of equitable estoppel and unclean hands.[79] In particular, he asserts, the doctrine of unclean hands applies, in that Inlet Taxi's failure to participate in the Board proceedings or respond to Mr. Rader's

[79] *See* Appellant's Brief, p. 9 ("Under equitable principles, including 'unclean hands', equitable estoppel, and others, the Board should have denied the employer parties the use of the tort settlement defense in the present case."). Mr. Atkins has not asserted that the Fund engaged in any wrongful conduct.

inquiries was "wrongful and directly related to the inability of Mr. Atkins to obtain their agreement to the tort settlements."[80]

For purposes of this part of our decision, we assume that an employer may be estopped to assert a defense under AS 23.30.015(h) and that the failure to respond at all to a request for written consent would be sufficient to avoid application of AS 23.30.015(h) under an equitable theory.[81] But an equitable bar to the employer's invocation of AS 23.30.015(h) would not apply unless it were shown that there was a causal relationship between Inlet Taxi's allegedly wrongful conduct and the harm to Mr. Atkins.[82]

Considering first Inlet Taxi's failure to participate in the Board proceedings, Mr. Atkins filed his claim on April 19, 2011, and Inlet Taxi was not obliged to answer it or otherwise to participate in the Board proceedings until May 9, 2011. By then, Mr. Atkins had already executed the release documents. Accordingly, there is no basis for finding a causal relationship between Inlet Taxi's failure to participate in the Board proceeding and Mr. Atkin's failure to obtain its consent to the third party settlement that he had already agreed to.

Turning to Inlet Taxi's failure to respond to inquiries from Mr. Rader, it is undisputed that Mr. Rader was unaware of the requirement to obtain Inlet Taxi's consent to the third party settlement.[83] Accordingly, his attempt to contact Inlet Taxi

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80 *Id.*

81 *Cf. Wood v. Caudle-Hyatt, Inc.*, 444 S.E.2d 3 (Va. Ct. App. 1994); *Hull v. Alaska Federal Savings and Loan Association of Juneau*, 658 P.2d 122, 125-126 (Alaska 1983) (subrogated debtor notified of non-judicial foreclosure is estopped to deny deficiency).

82 *See*, *e.g.*, *Shears v. Myers*, 280 P.2d 552, 558 (Alaska 2012) (unclean hands).

83 *See* 2014 Tr. at 86:14 – 87:22; 102:2-3.

could not have been an effort to obtain its written consent.[84] Absent any evidence that Mr. Rader or Mr. Atkins attempted to obtain Inlet Taxi's written consent, there is no basis for finding that there is a causal relationship between Inlet Taxi's failure to respond to Mr. Rader's attempts to contact it and the lack of written consent.

(3) Substantial Compliance.

Under the doctrine of substantial compliance, a failure to comply with the strict requirements of a statute may be excused, either when the statute in question is procedural and directory rather than mandatory[85] or when it is substantive,[86] if the person subject to the statutory requirement engages in "'conduct which falls short of strict compliance . . . but which affords the public the same protection that strict compliance would offer.'"[87]

The specific provision at issue in this case is the requirement to obtain written approval of a third party settlement. We will assume, for purposes of this decision, that to the extent that AS 23.30.015(h) is procedural it is directory, rather than mandatory.[88] Mr. Atkins contends that he substantially complied with this statutory requirement, because his failure to obtain the written consent of Inlet Taxi will have no adverse financial impact on Inlet Taxi.[89]

If Mr. Atkins had presented evidence that he obtained the <u>verbal</u> approval of Inlet Taxi, that might be considered substantial compliance with the requirement to

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[84] Mr. Rader testified that he sought to obtain the firm's cooperation with the third party claim. 2014 Tr. at 80:2-20. To the extent that testimony, standing alone, is ambiguous, Mr. Rader's lack of knowledge of the consent requirement removes any ambiguity.

[85] *See*, *e.g.*, *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska 2008).

[86] *See*, *e.g.*, *Adamson v. Municipality of Anchorage*, 333 P.3d 5 (Alaska 2014).

[87] *See Adamson v. Municipality of Anchorage*, 333 P.3d 5, 14 (Alaska 2014), quoting *Jones v. Short*, 696 P.2d 665, 667 note 10.

[88] We note that AS 23.30.015(h) does not state a rule governing the conduct of proceedings before the Board. Rather, it states a rule governing the legal effect of conduct that a party engages in outside of the Board proceedings.

[89] *See* Appellant's Brief, p. 10.

obtain written approval, absent any showing by Inlet Taxi that it was prejudiced by the settlement, because the fundamental requirement is that the employer approve the settlement rather than that the approval be written.[90] One might even argue that conduct or statements by Inlet Taxi that demonstrate its implied approval of the settlement would constitute substantial compliance, absent any evidence of prejudice.[91] But whether Inlet Taxi was financially prejudiced is not relevant to whether Mr. Atkins substantially complied with the requirement to obtain written approval of the third party settlement.

d. AS 23.30.015(h) Applies Absent Actual Prejudice.

In addition to the foregoing equitable considerations, we consider whether, as Mr. Atkins argues, AS 23.30.015(h) does not apply at all in the absence of financial prejudice.[92] Mr. Atkins' argument in this regard turns not on the specific wording of AS 23.30.015(h), but on the purpose and structure of AS 23.30.015:

> The clear purpose of [AS 23.30.015] is to allow employees to seek damages from third-party tortfeasors without jeopardizing their compensation while, at the same time, allowing employers to share in

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[90] *See Silides v. Thomas*, 559 P.2d 80, 88 (Alaska 1977); *Trident Seafoods Corporation v. Saad*, Alaska Workers' Comp. App. Comm'n Dec. No. 217 at 9-10 (Oct. 5, 2015).

[91] *Compare*, *State v. Jeffery*, 170 P.3d 226 (Alaska 2007) (where strict compliance is required, conduct from which required action might be inferred are insufficient). Alternatively, such conduct might be considered under a theory of waiver or estoppel. *See* 6 LARSON'S WORKER'S COMPENSATION LAW §116.07[4] ("The usual statute requires written consent, but courts, using such theories as waiver or estoppel, have generally managed to avoid the forfeiture of claimant's compensation rights whenever there was evidence of actual acquiescence in the settlement.") (2000 ed.).

[92] *See* Appellant's Reply Brief, pp. 2-6. Mr. Atkins made this argument in response to the Fund's position, stated in its initial brief, that the federal counterpart to AS 23.30.015(h) "conclusively presumes prejudice to the employer when a claimant fails to comply with the statute's requirements." Appellee's Brief, p. 10 citing, *e.g.*, *Bell v. O'Hearne*, 284 F.2d 777, 780 (4th Cir. 1960); *see also* Appellee's 2d Brief, pp. 26-31. The Fund initially characterized this argument as a reason for disregarding the doctrine of equitable estoppel. *See* Appellee's Brief, pp. 13-14, notes 6-7.

damage awards up to the limit of their exposure under the worker's compensation law.[93]

The Alaska legislature has chosen to accommodate these competing interests, in part, by imposing the "nonburdensome notice and approval requirements of AS 23.30.015(h)."[94] In the absence of any express statutory consequence for the failure to obtain the employer's approval, we might have grounds to limit the loss of compensation to cases in which the employer is financially predjudiced.[95] However, it is not within our authority to disregard the express consequence stated in AS 23.30.015(h).

e. An Employer May Not Wrongfully Withhold Approval.

Mr. Atkins' argument that AS 23.30.015(h) is inapplicable to uninsured employers and his equitable arguments highlight the inherent conflict between an employee's right to settle a third party claim for less than the full value of compensation due under the Act and an employer's right to subrogation up to the full amount of its liability under the Act. That conflict exists whether or not an employer is insured, and, as we have previously explained, we will not create an exemption that does not exist in statute absent ambiguity or legislative history to support it.

But that AS 23.30.015(h) is unambiguous with respect to an exception for uninsured employers does not mean that it is unambiguous in all other respects. In particular, we note that the phrase to "the person entitled to compensation" in an equivalent provision of the Longshore and Harbor Workers' Compensation Act was for many years construed as not including an employee whose employer had neither

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[93] *Forest v. Safeway Stores, Inc.*, 830 P.2d 778, 781 (Alaska 1992).

[94] *Id.*, 830 P.2d at 782. The approval requirement (as distinguished from the notice requirement) is properly characterized as "nonburdensome", we think, only to the extent that an employer or insurer may not unreasonably withhold approval upon a timely notice and request. *See infra*, pp. 18-21.

[95] *See*, *Bohn v. Industrial Commission of Arizona*, 999 P.2d 180 (Arizona 2000).

acknowledged liability nor paid compensation, until a divided United States Supreme Court in *Estate of Cowart v. Nikos Drilling Company* ruled otherwise in 1992.[96]

The *Cowart* majority concluded that:

> Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right.[97]

Consistent with what it considered to be the "plain language" and "clear meaning" of the statute as written, the majority held that the employer's approval is required regardless of the whether the employer has accepted liability or paid compensation. The minority, by contrast, concluded that

> It does not strain ordinary language to describe claimants whose employers have not acknowledged . . . liability as 'persons entitled to compensation,' but to withhold that description from claimants whose employers have denied liability for compensation.[98]

Both the majority and the dissent recognized that to interpret the phrase "persons entitled to compensation" as the claimant asked would have given the term a different meaning than it takes in other contexts in the Act; for the majority, this observation buttressed its view of the plain meaning of the term, notwithstanding its potentially harsh effect in this particular context,[99] while for the dissent, providing a different meaning in this context was clearly consistent with the underlying purposes of the Act.[100] At the same time, both the majority and dissent accepted the premise that

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[96] *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 112 S. Ct. 2589, 120 L.Ed. 2d 379 (1992) (hereinafter, *Cowart*).

[97] *Cowart*, 505 U.S. at 477, 112 S.Ct. at 2595.

[98] *Cowart*, 505 U.S. at 500, 112 S.Ct. at 2607 (Blackmun, J., dissenting).

[99] *See Cowart*, 505 U.S. at 478, 483, 112 S.Ct. at 2596, 2598.

[100] *See Cowart*, 505 U.S. at 499-500, 501, 112 S.Ct. at 2606, 2607 (Blackmun, J., dissenting).

an employer whose approval was required could withhold its consent in order to avoid liability, rather than to protect its right to subrogation to the full value of its liability.[101]

In our view, the latter premise is mistaken. The Act is interpreted "so as to ensure the quick, efficient, fair, and predictable delivery of . . . benefits to injured workers at a reasonable cost to . . . employers."[102] The purpose of AS 23.30.015(h) is to safeguard an employer's right to subrogation up to the full value of the compensation provided, not to permit an employer to avoid liability for compensation that is otherwise owed. The employer's right of approval is intended to protect employers against an undervalued settlement; beyond that, AS 23.30.015(h) should be construed to avoid the forfeiture of an otherwise valid claim.[103]

It is patently inimical to the purposes of the Act in general, and of AS 23.30.015(h) in particular, that an employer be permitted to avoid liability altogether by withholding approval for reasons unrelated to the purposes for which the right to withhold approval exists. We hold that, when an employee notifies an employer of the intent to compromise a third party claim and requests its approval of the settlement, the employer may withhold its approval only if it does so in good faith.[104] Given a requirement of good faith, we do not see that the term "persons entitled to compensation" in AS 23.30.015(h) must be construed as limited to persons for whom the employer has accepted liability or to whom it has made compensation payments.

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[101] *See Cowart*, 505 U.S. 483, 112 S.Ct. 2598; *id.*, 505 U.S. 490-491, 112 S.Ct. 2602 (Blackmun, J., dissenting). That such conduct occurs cannot be doubted. *See*, *e.g.*, Cowart, 505 U.S. at 499, 112 S.Ct at 483, 112 S.Ct. at 2598; *Pinell v. Patterson Service*, 22 BRBS 66 (Dept. of Labor Ben. Rev. Bd. 1989), 1989 WL 245292.

[102] AS 23.30.001(1).

[103] *See Forest*, 830 P.2d at 782, note 10.

[104] *See Eckhardt v. Village Inn (Vicorp)*, 826 P.2d 855 (Colo. 1992); *Potomac Insurance Co. v. Wilkins Co.*, 376 F.2d 425 (10th Cir. 1967). The burden of proof to show bad faith in this regard rests on the claimant. Because it is not necessary to address the existence of bad faith under the circumstances of this case, we leave further discussion of bad faith as it pertains to AS 23.30.015(h) for another day.

5. Conclusion.

Because Mr. Atkins neither notified Inlet Taxi of the third party settlement nor requested its approval before the settlement was fully executed, the failure to obtain its approval is fatal to his claim. The Board's decision is AFFIRMED.

Date: __*September 26, 2016*___ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Andrew M. Hemenway, Chair *pro tempore*

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the date shown in the commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Decision No. 229 issued in the matter of *Tracy O. Atkins vs. Inlet Transportation & Taxi Service, Inc. and State of Alaska, Workers' Compensation Benefits Guaranty Fund,* AWCAC Appeal No. 14-011, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 26, 2016.

Date: *September 27, 2016*

Signed

K. Morrison, Appeals Commission Clerk