Alaska Workers' Compensation Appeals Commission

Alaska Insurance Guaranty Ass'n and Northern Adjusters,
Movants,

vs.

Edwin Simons, Fairbanks Nissan, and Alaska Workers' Compensation Benefits Guaranty Fund,
Respondents.

MEMORANDUM DECISION
Decision No. 011 June 2, 2006
AWCAC Appeal No. 06-013
AWCB Decision No. 06-097
AWCB Case No. 200029154

Memorandum decision on motion by Alaska Insurance Guaranty Association and Northern Adjusters for extraordinary review of Alaska Workers' Compensation Board Decision No. 06-097, William Walters, Chairman; Debra G. Norum, Member for Management; Damien J. Thomas, Member for Labor.

Appearances: Timothy J. McKeever, Holmes, Weddle, Barcott, for Movants Alaska Insurance Guaranty Association and Northern Adjusters; Edwin Simons, self-represented, Toby Steinberger, AAG, Office of the Attorney General for Alaska Workers' Compensation Benefits Guaranty Fund.

Before: Marc Stemp and John Giuchici, Appeals Commissioners, Kristin Knudsen, Chair.

By: Kristin Knudsen, Chair.

This motion for extraordinary review challenges the board's construction of AS 21.80.060(a)(1). The movant, Alaska Insurance Guaranty Association (AIGA), asked the board to be dismissed as a party to the employee's claim, arguing it was not liable for claims filed after December 31, 2003, the deadline set by the court for presentation of claims to the liquidator of Reliance Insurance, the employer's bankrupt insurer. The

board, relying on *Jonathon v. Doyon Drilling, Inc.*,[1] construed the word "claim" used in AS 21.80.060(a)(1) to mean "an arisen right" but in AS 21.80.060(a)(1)(B) to mean "a filed pleading."[2] It concluded the two subsections of AS 21.80.060(a)(1) should be "read in the disjunctive" and, therefore, "the employee's benefits are covered by the AIGA if either his coverage under the Alaska Workers' Compensation Act had already arisen, or he filed a written 'claim,' before the deadline set by the liquidating court."[3]

We conclude the board misconstrued AS 21.80.060(a)(1)[4] for reasons explained below. However, because the AIGA may still be liable under AS 21.80.060(a)(1)(B), and because the board should have the opportunity to take additional evidence before

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[1] 890 P.2d 1121 (Alaska 1995).

[2] *Edwin Simons v. Fairbanks Nissan,* AWCB Decision No. 06-0097, p. 6 (April 25, 2006).

[3] *Id.* at p. 6-7.

[4] AS 21.80.060(a)(1) provides:

> (a) The association
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> (1) is obligated to pay covered claims existing before the order of liquidation and arising within 30 days after the order of liquidation, or before the policy expiration date if less than 30 days after the order of liquidation, or before the insured replaces the policy or causes its cancellation if the insured does so within 30 days after the order of liquidation, but this obligation includes only that amount of each covered claim that is less than $500,000, except that a covered claim for return of unearned premium may not exceed $10,000 for each policy, and except that the association shall pay the full amount of any covered claim arising out of a workers' compensation policy; the association is not obligated
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> (A) to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises; or
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> (B) to pay a claim filed with the association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer;

deciding whether the employee has a viable claim, we decline extraordinary review. In declining extraordinary review, we do not decide whether or not the AIGA is liable under AS 21.80.060(a)(1). The issue raised by the Alaska Workers' Compensation Benefits Guaranty Fund (WC Fund), (whether the "final date" in AS 21.80.060(a)(1)(B) is the final date for filing claims established in the order of liquidation or a later "bar date"), is better addressed on appeal, if appeal is taken.

Factual background.

The commission recites facts taken from the board's interlocutory decision, except where otherwise cited. The commission makes no independent findings of fact, and does not examine whether the facts described by the board are supported by substantial evidence in the record at this time.

Edwin Simons is a service technician/mechanic.[5] He worked for Fairbanks Nissan until June 20, 2000. He then went to work for Stanley Nissan. Sometime in 2001, he began using hearing protection.[6] After going to an audiologist and learning how much hearing aids cost,[7] Simons filed a notice of injury and a claim with the board on August 8, 2005. He named the employer as Fairbanks Nissan, and his date of injury as June 20, 2000, the last day he was exposed to sound at Fairbanks Nissan.

Procedural History.

Fairbanks Nissan was insured by Reliance Insurance Co. at the time of Simons' last date of exposure. Because Reliance was in receivership, its claims were assumed by the AIGA. Northern Adjusters filed a response to the claim on behalf of the AIGA and Fairbanks Nissan.[8] After Simons filed a request for a hearing, the AIGA asserted

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[5] Simons' statement to the commission in the hearing on the request for a stay, May 15, 2005.

[6] *Id.*

[7] *Id.*

[8] *Edwin Simons v. Fairbanks Nissan*, *supra,* at p. 2. It is not clear whether Northern Adjusters was acting solely on behalf of the AIGA by the time of the March 30, 2006 hearing on the AIGA defenses, and if so, what notice had been given to Fairbanks

that it was no longer obligated to pay covered claims against Fairbanks Nissan, as the time for filing claims had ended by court order on December 31, 2003. The AIGA also challenged the board's jurisdiction to decide whether it was obligated to pay claims under AS 21.80.060(a)(1). The board scheduled a hearing on the written record in January 2006 to consider the AIGA's defenses. Prior to the hearing, the AIGA petitioned to join the WC Fund. As a result, the record was preserved and the hearing continued to allow response to the petition to join. A hearing of the merits of Simons' claims was scheduled for May 25, 2006. The board heard the petition to join and the AIGA defense on the written record March 30, 2006.

On April 25, 2006, the board issued a decision denying the AIGA's request that the board agree that it could not be obligated to pay Simons' claim and joining the WC Fund as a party. The board reasoned that

> in the context of AS 21.80.060, we find that "claim" is used in the sense of an arisen right at AS 21.80.060(a)(1), and as a filed pleading at AS 21.80.060(a)(1)(B). In accord with the reasoning of the Court in *Jonathan*, we find that these two subsections should be read in the disjunctive. We find that it "makes no sense" to require a formal pleading to raise an already arisen and undisputed right. We conclude that the employee's benefits are covered by the AIGA if either his coverage under the Alaska Workers' Compensation Act had already arisen, or he filed a written "claim," before the deadline set by the liquidating court.[9]

Citing an "absence of evidence related to the actual date of notice to the employer," the board stated it could not "definitively say whether or not" the employee's claim was "covered by the AIGA."[10] The board concluded that AIGA remained a party as a "person against whom a right to relief may exist."[11]

Nissan that coverage of the claim against Fairbanks Nissan would not be defended by Northern Adjusters.

[9] *Id.* at p. 6-7.

[10] *Id.* at p. 7.

[11] *Id.*

Arguments to the Commission.

The movant argues that the board incorrectly construed the statute "in the disjunctive." It argues that the purpose of the statute was to terminate the AIGA's liability for workers' compensation claims that are not "filed" prior to the date set by the court's order of liquidation, and that the legislature was aware that a "gap" in coverage between an employer's potential liability and the insurer's obligation under the contract of insurance was possible under the legislation. The AIGA argues that regardless of whether the employee had an "arisen right" under the workers' compensation act, failure to file a claim excuses the AIGA from the obligation to cover the employer. Therefore, the AIGA should be dismissed as a party to the employee's claim. The AIGA urges that it be spared the unnecessary expense of defending and possibly paying a claim it is not obligated to pay.[12]

Simons argues that his claim has taken long enough to come to hearing and that further delay imposed by a motion for extraordinary review works sufficient hardship on him that it outweighs any expense that the AIGA may incur in defending employer's claim before the board. The motion for extraordinary review should be denied because it will delay a hearing on the merits of his claim.

The respondent Alaska Workers' Compensation Benefits Guaranty Fund (WC Fund) argues that AIGA assumes the obligation to pay "covered claims" by operation of law, and therefore is a proper party to the employee's claim. The WC Fund does not argue that the board correctly construed AS 21.80.060(a)(1). Instead, the WC Fund focuses on another part of that statute, arguing that the Pennsylvania court's order of

[12] The AIGA also argued that the Board does not have "subject matter jurisdiction" to determine whether AIGA must pay a claim under the Alaska Insurance Guaranty Act. We agree to the extent that the superior court is the proper forum for a declaratory judgment action to determine whether AS 21.80.060(a)(1) excuses AIGA from payment of a particular claim or class of claims. The Board did not determine whether the AIGA must pay a claim, but whether it is a "party" to the employee's claim within the meaning of 8 AAC 45.040(d): "Any person against whom a right to relief may exist should be joined as a party." When making this decision, the Board may interpret other Alaska statutes, as, for example, it must do when determining whether an employee is a minor.

liquidation did not establish the "final date set by the court" for filing claims because Pennsylvania laws, and the court's order, make explicit provision for "late claims". The liquidator has not asked the Pennsylvania court to set a "bar date" after which late claims cannot be filed. Because the AIGA can file a "late claim" for cause and the "final date" has not been set, WC Fund argues, the AIGA remains liable for coverage if there is a "covered claim."

> *AS 21.80.060(a)(1)(B) excepts payment of claims filed after the final date set by the court for the filing claims against the liquidator from the general obligation to pay "covered claims."*

The AIGA is obliged to pay "covered claims existing before the order of liquidation and arising within 30 days after the order of liquidation."[13] A "covered claim" is defined at AS 21.80.180(6) as "an unpaid claim . . . that arises out of and is within the coverage . . . of an insurance policy issued by an insurer . . . if the insurer becomes an insolvent insurer and (A) the claimant or insured is a resident of this state at the time of the insured event." Therefore, AIGA is obligated under AS 21.80.060(a)(1) to pay claims that (1) arise out of and are within the workers' compensation insurance policy issued by Reliance to an employer; (2) are unpaid; and, (3) existed before the order of liquidation or arose within 30 days after the order of liquidation.

However, AS 21.80.060(a)(1) concludes with two exceptions to AIGA's obligation to pay covered claims:

> the association is not obligated
> (A) to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises; or
> (B) to pay a claim filed with the association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

Sub-subparagraph (A) states that the association is not obligated to pay more than the original contract of insurance provided. Sub-subparagraph (B) states that the

[13] AS 21.80.060(a)(1).

association is not obligated to pay a claim filed with the association after "the final date set by the court for the filing of claims against the liquidator or receiver."

The board is correct that the word "claim" may be used to mean an "arisen right" or a "filed writing."[14] In sub-subparagraph (A) above, its meaning may be closer to "a right to benefits", but, as the board concluded, a "filed writing" in sub-subparagraph (B). Because the statute inserts the word "or" between (A) and (B), those two sub-subparagraphs are read in the disjunctive. They establish the two independent excuses for non-payment of the obligation established in the last phrase of (a)(1). The board errs, however, in concluding that the clause following the semicolon at the end of subparagraph (a)(1) should be "read in the disjunctive" with the clause before the semicolon, so as to establish two independent means of qualification for payment, either that the covered claim had arisen (i.e., was existing) "before the order of liquidation" or that the employee filed the claim "before the final order of liquidation."

Where a statute's meaning is plain, its language clear and unambiguous, it must be held to mean what it plainly expresses.[15] In this case, the statute's meaning is sufficiently clear that no aid to interpretation is needed to resolve its meaning.

The use of the disjunctive "or" between two equally subordinate clauses is illustrated by the "or" between § .060(a)(1)(A) and § .060(a)(1)(B). However, § .060(a)(1) and § .060(a)(1)(B) are not equal; § .060(a)(1)(B) is subordinate to § .060(a)(1). The board's interpretation inserts an "or" following the semicolon in § .060(a)(1) in order to create two means of qualification. The board also recast the last clause of § .060(a)(1) as positive, instead of a negative provision excluding certain claims from the obligation to pay.

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[14] *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121 (Alaska 1995) concerned differing meanings of "claim" used in different sections of the Alaska Workers' Compensation Act; it did not address the meaning of "covered claim" within the Alaska Insurance Guaranty Act, which provides a statutory definition to be used within the Act at AS 21.80.160(6). As the Supreme Court noted, the word "claim" is not defined in the Workers' Compensation Act. *Id.* at p. 1123.

[15] 2A Singer, Sutherland Statutory Construction § 46:01 (6th ed. 2000); *City of Kenai v. Kenai Peninsula Newspapers, Inc.*, 642 P.2d 1316 (Alaska 1982).

AS 21.80.060(a)(1) imposes a general, positive obligation on the AIGA ("obligated to pay covered claims"), followed by a limit on the obligation, ("but this obligation includes only that amount of each covered claim that is less than $500,000") and then two exceptions to the limitation, ("except that a covered claim for return of unearned premium may not exceed $10,000 . . . , and except that the association shall pay the full amount of any covered claim arising out of a workers' compensation policy"). In other words, the AIGA must pay covered claims up to a $500,000 cap, except that covered claims for unearned premiums are capped at $10,000 and there is no cap on workers' compensation claims. Separated from this positive statement of obligation by a semicolon, an independent clause states that the "association is not obligated" to do two things, either pay a policy holder more than the amount provided in the policy, or pay a claim filed with AIGA after the "final date." The independent clause "the association is not obligated" creates an exception to the general obligation "to pay covered claims" imposed by the first clause of subparagraph (1). Thus, even if the covered claim existed before the order of liquidation, the AIGA is "not obligated" to pay the claim if the claim was not filed before the final date set by the court.

To suggest an "or" follows the semicolon distorts the meaning of the statute. The board's construction would require that the provision in (a)(1)(A) be interpreted "in the disjunctive" as well, which makes no sense: the AIGA is obligated to pay a "claim within coverage" up to $500,000, *or* the AIGA would not be obligated to pay an "amount in excess of the obligation . . . under the policy". It makes more sense if the statute imposes a general obligation, then provides a limited excuse from the obligation: the AIGA is required to pay a "claim within coverage" up to $500,000; *but* the AIGA is not required to pay amounts in excess of the policy. Thus if the policy was for $600,000, AIGA is required to pay a claim in the policy's coverage "up to $500,000," *but* if the policy is for $300,000, AIGA is only required to pay up to the policy limit. Similarly, the AIGA is obligated to pay covered claims existing before the order of liquidation; *but* the AIGA is not obligated to pay claims filed after the final date set by the court.

Jonathan v. Doyon Drilling, Inc., does not compel a different reading. In that case, the Supreme Court construed the time for requesting a hearing after a "claim is controverted" in AS 23.30.110(c) in harmony with the time for "filing the claim" established in AS 23.30.105, noting that to do otherwise would render the two-year limitation period in AS 23.30.105 "essentially meaningless."[16] In both sections, the Court found the word "claim" meant a written request for benefits. We agree that the phrase "covered claims" used in AS 21.80.060(a)(1) has a different meaning[17] than "claim" in AS 21.80.060(a)(1)(A) and "claims filed with the association" in AS 21.80.060(a)(1)(B). However, that difference does not require that we disregard the plain meaning of AS 21.80.060(a)(1). Reading the two clauses of AS 21.80.060(a)(1) "in the disjunctive" is not required to avoid rendering either clause meaningless. On the other hand, reading AS 21.80.060(a)(1) as the board does would render AS 21.80.060(a)(1)(A) ineffective, for the board's interpretation permits a claimant to escape policy limits "up to $500,000" or reach policy limits that are higher than $500,000. We also note that courts of other jurisdictions have construed the similar language of other insurance guaranty acts to prohibit payment of covered claims filed after the final date set by the court.[18]

> *The AIGA may be liable to pay covered claims if the final date for filing claims has not been set by the court.*

Although we disagree with the board's interpretation of the statute, we do not take this matter up on extraordinary review because we are persuaded by WC Fund's argument that granting extraordinary review is premature. The WC Fund argues that

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[16] 890 P.2d at 1124.

[17] We note that "covered claim" is defined at AS 21.80.160(6). We need not construe its meaning further in this decision.

[18] *Pacific Ins. Co. v. Catholic Bishop of Spokane*, ___ P.3d ___, 2005 WL 3576965 (E.D. Wash. Dec. 29, 2005); *Cannelton Industries, Inc. v. Aetna Cas. & Surety Co.,* 194 W.Va. 203, 210, 460 S.E.2d 18, 25 (1994); *Lake Hosp. Sys., Inc., v. Ohio Ins. Guar. Ass'n*, 69 Ohio St.3d 521, 525-526, 624 N.E.2d 611, 615 (1994); *Satellite Bowl, Inc. v. Mich. Prop. & Cas. Guar. Ass'n,* 165 Mich. App. 768, 419 N.W.2d 460, 462 (1988).

the "final date" for filing claims may not have passed. While the issue has not been addressed by the Alaska Supreme Court, we note that the "final date" has been interpreted as the "bar date" by other courts, in *Whitehouse v. Rumford Prop. & Liab. Ins. Co.*,[19] *Cannelton Industries, Inc. v. Aetna Cas. & Surety Co.*, [20] and *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Ass'n.*[21] However, it is not clear in reading these cases that a "final date set by the court" is distinguishable from "bar date" or is the "last day for filing" followed by another "bar date."

The WC Fund argues that the Pennsylvania statute allows a court to set both a "last day for filing" followed by a period permitting late filing for cause[22] before the court sets a "bar date." While Alaska law establishes the rights and obligations of the AIGA, the Alaska statute does not define the "final date" beyond which the AIGA cannot pay claims; the Alaska act permits "the court" issuing the order of liquidation to set the "final date for the filing of claims." AS 21.80.060(a)(1)(B). In this case, that court is the Commonwealth Court of Pennsylvania. If that court has not yet set a "bar date which would absolutely bar the filing of any new claims"[23] under Pennsylvania law, we cannot say that the court has set the "final" date for filing, although it set the "last date for filing."

It may be that the discretion to permit late filing is rarely exercised in favor of guaranty associations or only granted upon conditions AIGA cannot meet. It may be that the likelihood of AIGA recovering its payments on a late filed claim is so faint that it is futile to file in practice, if not in law. No record has been made on these issues. The question of late filing was not raised by the movants in the motion for extraordinary

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[19] 658 A.2d 506 (R.I. 1995).

[20] *Supra,* at 194 W.Va. 208, 460 S.E.2d 23.

[21] *Supra,* at 69 Ohio St.3d 525, 624 N.E.2d 614-615.

[22] 40 P.S. 221.37.

[23] "Liquidator's Report Pursuant to Order of January 5, 2006," Respondent WC Fund's Ex. D, p. 7.

review. We do not find this issue is so compelling, particularly in the present stage of the case and the lack of record, that we should intervene in the board's process on the basis of a question not raised directly by the motion for extraordinary review. These issues may be reserved for appeal, if appeal is taken, when a more deliberate consideration of the question is possible.[24]

Conclusion.

It is not possible at this time, without further development of the record, to determine that the AIGA is, or is not, a "person against whom a right to relief may exist." The AIGA may be such a person if the employee has a covered claim against the AIGA and if the claim was filed in the AIGA before the "final date" for filing claims set by the Pennsylvania court. Therefore, we deny the motion for extraordinary review.

Dated: June 2, 2006 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Not available for signature at time issued.
Marc Stemp, Appeals Commissioner

Signed
Kristin Knudsen, Chair

I certify that on *6/2/2006* a copy of this Memorandum Decision was mailed to McKeever, Steinberger, Simons, AWCB-Fbx, Director WCD and AWCB Appeals Clerk. I also faxed a copy to McKeever, Steinberger, AWCB-Fbx, and Director WCD.

Signed
Ingrid Helgeson, Deputy Clerk

[24] Alternatively, the AIGA may bring an action for declaratory judgment in Superior Court to determine if it must pay covered claims arising out of the policy issued to Fairbanks Nissan that were not filed with the AIGA by the "final date for filing" under Alaska law.