Case: *Doyon Drilling, Inc. and Alaska National Insurance Co. vs. Randy A. Whitaker*, Alaska Workers' Comp. App. Comm'n Dec. No. 001 (December 29, 2005)

Facts: Employer sought stay of the board's December 14, 2005, order requiring continuing payment of temporary total disability (TTD) and a past-due lump-sum payment. The background leading up to the issuance of this order concerns an earlier order that was appealed. In connection with Whitaker's right knee injury in April 2002, the Board concluded that Whitaker had provided clear and convincing evidence that he was not medically stable and so ordered the employer to pay "continuing TTD or TPD benefits from February 28, 2004 forward through the period of his recovery." The employer appealed this decision, issued December 21, 2004, to the superior court. The superior court denied a stay of payments while the appeal was pending; the commission was unaware of the basis for this decision. Meanwhile, while the merits of that appeal was pending before the superior court, the employer again controverted TTD on July 22, 2005, on the basis that Whitaker was now medically stable (or in the words of its previous order "the period of recovery" was over). No party sought a remand from the superior court. Whitaker filed a claim seeking ongoing TTD. The board decided on December 14, 2005, that because it lacked jurisdiction to modify its 2004 order since that order was on appeal to the superior court, Whitaker had proved he was entitled to ongoing TTD. The board ordered payment of past-due benefits from July to December 2005 and required TTD payments to continue.

Statutes/regulations/case law: AS 23.30.125(c). The commission may grant a stay of payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage," AS 23.30.125(c), and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus more deliberate investigation." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska 1992). Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable harm *and* "the existence of the probability of the merits of the appeal being decided *adversely to the recipient* of the compensation payments." AS 23.30.125(c).

Issue: Should the commission grant a stay of payments?

Holding/analysis: The commission denied the stay for continuing TTD because the commission could not say there was a "clear probability" that the merits of the appeal would be decided adversely to the recipient of the compensation payments. The commission was concerned that the board lacked jurisdiction and ordered additional briefing to allow it to reconsider its decision. The commission granted the stay for lump-sum payment of past-due benefits because the employer would probably not be able to recover payment if it was ultimately successful (since employer is only permitted to withhold overpaid benefits from future benefit payments per AS 23.30.155(j) and if the employer was successful, it probably would not owe any future benefits payments from which it could withhold the benefits it overpaid.)

Notes: See Comm'n Dec. No. 006 for the commission's final decision on the merits of this appeal, and No. 008 for the commission's decision on attorney fees. The commission amended the regulation on stays, 8 AAC 57.100, effective March 24, 2012.