

**Case:** *Linda Schouten vs. Alaska Industrial Hardware and AIG Claims Services*, Alaska Workers' Comp. App. Comm'n Dec. No. 094 (December 5, 2008)

**Facts:** Linda Schouten (Schouten) injured her back closing a garage door at work in September 2005. She had pre-existing degenerative disc disease. At least two doctors recommended physical therapy to recover from the temporary aggravation of her back condition. Schouten attended some physical therapy appointments, missed other ones, and told her doctor that she did not want to do physical therapy. An employer medical evaluation (EME) concluded that she was medically stable as of the date of the exam, May 8, 2006. The employer controverted temporary total disability (TTD) and medical benefits on July 5, 2006, arguing that Schouten was medically stable based on the EME opinion that her work-related injury had resolved. A second independent medical evaluation concluded that she was not medically stable because she could improve with physical therapy but that, if she would not do physical therapy, she was medically stable as of April 24, 2006.

The board suspended Schouten's TTD as of July 5, 2006, the date the employer controverted her benefits, "until she successfully completes a physical therapy program." The board did not make any findings on medical stability. Schouten appealed.

**Applicable law:** AS 23.30.185 provides, "Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability." Medical stability means:

[T]he date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. AS 23.30.395(27).

AS 23.30.095(d) states:

If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order suspend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the . . . suspension, unless the circumstances justified the refusal.

In *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981) the Alaska Supreme Court (supreme court) held that the board was limited to deciding "questions raised by the parties or by the agency upon notice duly given to the parties." The scope of the board's authority is a question of law to which the commission applies its independent judgment (citing *Simon*).

The board's regulations limit the issues at hearing to those summarized at the prehearing conference. 8 AAC 45.065(c) and 45.070(g).

In *Metcalf v. Felec Servs.*, 784 P.2d 1386, 1388-90 (Alaska 1990), the supreme court concluded that the employer or insurer must petition for a suspension under AS 23.30.095(d), and it was up to the board to decide to suspend benefits after a hearing was held on the merits of each party's evidence. The supreme court held that the board could not retroactively suspend benefits or retroactively ratify an insurer's or employer's unilateral discontinuation of benefits because of an unreasonable refusal to have medical treatment.

**Issues:** When can the board raise questions that the parties have not raised? Could the board retroactively suspend benefits under AS 23.30.095(d)? Did the board make adequate findings of fact?

**Holding/analysis:** The commission concluded that the board failed to decide the issue the employer raised, whether Schouten's TTD benefits should end because she had reached medical stability. Moreover, the board could not decide suspension under AS 23.30.095(d) because the employer had not requested suspension, and the board did not give any notice to the parties that it would consider that issue. Whether benefits should be suspended under AS 23.30.095(d) was not listed on the prehearing conference summary that controls the issues at hearing. Schouten needed notice to adequately defend the issue.

In addition, the commission concluded that the board may not retroactively suspend an employee's TTD under AS 23.30.095(d) as of the date that the employer controverted benefits under *Metcalf*. The board may only suspend benefits as of the date of its order, in this case, August 17, 2007, *only if* substantial evidence supported that Schouten's refusal was unreasonable (an issue the commission did not decide) and *only if* the suspension issue was properly before the board.

The commission vacated the board's decision and remanded with instructions to decide the issue of medical stability.