# ALASKA WORKERS' COMPENSATION BOARD

**P.O. Box 115512** **Juneau, Alaska 99811-5512**

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| MICHAEL J. SCHWARZ,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>K&L DISTRIBUTORS,<br><br>Employer,<br>and<br><br>CNA/NORTHERN ADJUSTERS, INC.,<br><br>Insurers,<br>Defendants. | ) | INTERLOCUTORY<br>DECISION AND ORDER<br><br>AWCB Case Nos. 200522394M<br>& 201506034J<br><br>AWCB Decision No. 16-0059<br><br>Filed with AWCB Anchorage, Alaska<br>On July 22, 2016 |

Michael J. Schwarz's (Employee) September 11, 2015 petition to join was heard on June 22, 2016, in Anchorage, Alaska, a date selected on April 9, 2016. Attorney Michael Jensen appeared and represented Employee. Attorney Robert McLaughlin appeared and represented the Alaska Insurance Guaranty Association (AIGA). Attorney Joseph Cooper appeared and represented K&L Distributors (Employer) and the Alaska Insurance Guaranty Association (AIGA). Attorney Martha Tansik appeared and represented Employer, Wausau Underwriters Insurance Company, and Employer's Insurance Company of Wausau, both of the latter d/b/a Liberty Mutual Insurance Company (collectively, "Liberty"). Attorney Aaron Sandone appeared and represented Employer and AIG Claims/Northern Adjusters (AIG). Attorney Jeffrey Holloway appeared telephonically and represented Employer and CNA/Northern Adjusters (CNA). There were no witnesses. The record closed at the hearing's conclusion on June 22, 2016.

## ISSUE

Employee contends the insurers providing Employer's workers' compensation indemnification between 1990 and 2005 should be joined to the claim for a cumulative injury gradually occurring over those years.

Employer and the five insurers or successors-in-interest to insurers (collectively, "Insurers") contend joinder is not appropriate considering Employee's complex history and claims, the analysis required under 8 AAC 45.040 and his failure to file injury reports and claims against each insurer.

**Should all Insurers be joined as parties?**

## FINDINGS OF FACT

1) On April 8, 1996, Employer reported that Employee had injured his back at work while living kegs and loading trucks. This injury resulted in Employee's disability for 6 days, for which Employer paid workers' compensation. (Report of Injury, AWCB 199604596, April 8, 1996; Compensation Report, April 29, 1996).

2) On May 18, 1999, Employer reported that Employee had injured his back at work. Employee was treated periodically until the physician determined he reached maximum medical improvement. (Report of Injury, AWCB 199908963, May 18, 1999; Physician's Reports, AWCB 199908963, November 12, 1999).

3) On July 2, 2003, a court in Los Angeles, California liquidated Fremont Indemnity. The order stated

> Any and all claims against [Fremont] (except those policyholder claims already pending against [Fremont], which are hereby deemed filed with the Liquidator, who shall maintain a list of such claims), including those which in any way affect or seek to affect any of the assets of [Fremont], wherever or however such assets may be owned or held, must be filed by no later than June 30, 2004, (the 'Claims Bar Date'), together with proper proof thereof, in accordance with the provisions of Insurance Code §1010, et seq., including, but not limited to §1023, and any claim not filed by the Claims Bar Date is conclusively deemed forever waived. (Order, July 2, 2003).

4) On December 31, 2003, Proofs of Claims were sent by the California Insurance Commissioner's Conservation & Liquidation Office to Employer at two addresses: 6307 Arctic Spur Road, Anchorage, AK, 99518, and 3215 Lind Ave SW, Renton, WA 98055. The latter mailing resulted in indications it was not the correct destination, and a new mailing was sent to the forwarding address provided. Neither mailing resulted in a returned Proof of Claim by the Claim Bar Date, June 30, 2004, and both Proofs of Claims were ultimately closed. (Affidavit, December 8, 2015).

5) On January 19, 2006, Employer filed a written injury report, stating Employee's back had "developed soreness over time." The report indicated Employee's belief that his last exposure to injury was December 30, 2005, and that Employer knew he was injured on that date. The injury report further stated Employee was hired on June 26, 1990. (Report of Occupational Injury or Illness, January 19, 2006).

6) On May 16, 2014, Employee filed a workers' compensation claim (WCC) for benefits for the 2005 injury stating repetitive lifting at work had developed soreness and pain in his back, left buttock, and left leg. Employee said benefits had been controverted in December 2013. (WCC, May 16, 2014).

7) On July 9, 2014, Employee filed an amended WCC for permanent partial impairment (PPI), medical and transportation expenses, interest, and attorney's fees and costs relating to "injuries due to a traumatic incident and/or cumulative trauma in the course and scope of [Employee's] employment." The claim listed Employer as the employer and CNA as the insurer, and noted it was amending a prior claim filed on May 16, 2014. (WCC, July 9, 2014).

8) On July 28, 2014, CNA filed a controversion notice and answer to Employee's July 9, 2014 WCC stating that any claims based on cumulative or continuous trauma prior to December 2005 were barred under AS 23.30.100, .105, .110, or otherwise barred by law or equity. (Controversion Notice, July 28, 2014; Answer, July 28, 2014).

9) On April 14, 2015, Employee filed a WCC for PPI, medical and transportation expenses, interest, and attorney's fees and costs relating to "injuries due to a traumatic incident and/or cumulative trauma in the course and scope of [Employee's] employment." The claim listed Employer as the employer and CNA as the insurer. (WCC, April 14, 2015).

10) On April 15, 2015, the division served the claim on Northern Adjusters. (WCC, April 15, 2015).

11) On April 20, 2015, the Board opened AWCB file 201506034 based on the claimed cumulative injury, listing a June 26, 1990 injury date. Notice was sent to Northern Adjusters, requesting that they file the appropriate First Report of Injury. (6106B and 6106C Notices, April 20, 2015).

12) On September 11, 2015, Employee filed a petition to join five parties to his pending claim and served the named entities. Each party listed the employer to be joined as K&L Distributors. The Insurers listed to be joined are:

> Commerce & Industry Ins. Co.
> Wausau Underwriters Ins. Co.
> Employers Ins. Co. of Wausau
> Fremont Indemnity Co. of the NW
> AK Insurance Guaranty Fund for Fremont Indemnity Co. c/o Northern Adjusters
> (Petition, September 11, 2015).

13) On September 21, 2015, Employer and CNA filed an answer to Employee's petition, opposing joinder. (Answer, September 21, 2015).

14) On October 5, 2015, Employer and AIG filed an answer to Employee's petition to join, stating they were unaware of any claim or injury report alleging injury during AIG's coverage and joinder was therefore premature. They also objected to joinder under 8 AAC 45.040(i). (Answer, October 5, 2015).

15) On October 15, 2015, Employee filed a hearing request on his petition to join. (Affidavit of Readiness for Hearing, October 15, 2015).

16) On October 20, 2015, Employer and AIGA filed an answer to Employee's petition to join, stating that AIGA had not been served with the petition to join, and AIGA opposed joinder because it lacked supporting justification. (Answer, October 20, 2015).

17) On December 1, 2015, the Board again advised Northern Adjusters that the case file was established, indicating the claimant, employer, injury date (June 26, 1990), and file number (201506034). The notice further requested any necessary corrections if Northern Adjusters was not the correct claims administrator for the injury. (6101C Notice, December 1, 2015).

18) On December 15, 2015, attorneys Jensen, Holloway, Cooper, and Sandone attended a prehearing conference. Attorney Cooper clarified that he represented AIGA only for the specific

dates April 1, 1996 and May 14, 1999. The parties were informed that there were two cases joined under AWCB 200522394M, and AWCB 201506034J had been established for Employee's April 13, 2015 cumulative injury claim. Employee stated he filed no written injury report with Employer for the cumulative injury, but added he gave Employer injury notice within 30 days of Employee's knowledge of the cumulative injury. The designee set a follow-up prehearing conference for all parties who might be liable under the cumulative injury claim. (Prehearing Conference Summary, December 15, 2015).

19) On January 25, 2016, attorneys Jensen, Holloway, Cooper, Sandone, McLaughlin, and Tansik attended a prehearing conference. Attorney McLaughlin confirmed he represents AIGA except for the dates for which attorney Cooper represents AIGA. Attorney Holloway confirmed he represents Northern Adjusters for the period January 1, 2005 through January 1, 2007. Attorney Sandone confirmed he represents the Commerce & Industry Insurance Corporation. The board's designee stated a follow-up prehearing would be set to allow Employee time to serve Employer with the petition to join, since it appeared Employer was uninsured at times during the relevant period. (Prehearing Conference Summary, January 25, 2016).

20) On January 28, 2016, Employee re-served the September 11, 2015 petition to join on the five Insurers and Employer. Employee served the petition on Employer directly, and on the various attorneys for Insurers. (Affidavit of Service, January 28, 2016).

21) On February 8, 2016, Employer and Liberty objected to joinder, stating valid affirmative defenses existed, Liberty only received the petition to join on January 29, 2016, and no workers' compensation claim had been filed against Liberty for the January 1, 2001 through January 1, 2004 coverage period. (Answer, February 8, 2016).

22) On February 17, 2016, Employer and AIG renewed their previous answer to Employee's petition to join. (Answer, February 17, 2016).

23) On February 24, 2016, Employee filed another hearing request on his September 11, 2015 petition to join. (Affidavit of Readiness for Hearing, February 24, 2016).

24) Insurers, their respective dates of coverage, and their attorneys are as follows:

AIGA – 1/1/1993 through 1/1/2001 – Attorney McLaughlin
AIGA – 4/1/1996 and 5/14/1999 – Attorney Cooper
Wausau (now Liberty) – 1/1/2001 through 1/1/2004 – Attorney Tansik
AIG – 1/1/2004 through 12/31/2004 – Attorney Sandone
CNA – 1/1/2005 through 1/1/2007 – Attorney Holloway (Hearing).

25) AIG filed pleadings indicating Griffin & Smith, through attorney Sandone, represents AIG, Commerce & Industry Insurance Corporation and "others" without the latter identified. A prehearing conference summary found attorney Sandone represents Commerce & Industry Insurance Corporation, and no correction was requested or any change made in later proceedings. Attorney Sandone represents both AIG and Commerce & Industry Insurance Corporation, and "AIG" hereinafter will refer to Commerce & Industry Insurance Corporation and AIG/Northern Adjusters. (Answer, October 27, 2015; Affidavit, November 4, 2015; Prehearing Conference Summary, January 25, 2016; Answer, February 17, 2016; Affidavit, March 3, 2016; Hearing Brief of Emerald Shared Services, LLC dba K&L Distributors, AIG/Northern Adjusters, June 15, 2016).

PRINCIPLES OF LAW

**AS 21.80.060. Powers and duties of the association.** (a) The association

> (1) is obligated to pay covered claims existing before the order of liquidation and arising within 30 days after the order of liquidation; . . . the association is not obligated
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> . . . .
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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;
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> (2) is considered the insurer to the extent of its obligation on the covered claims and to that extent has all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent;

In *AIGA and Northern Adjusters v. Simon*, AWCAC Dec. No. 011 (June 2, 2006), the Alaska Workers' Compensation Appeals Commission extensively discussed the boundaries of the obligations and exceptions in AS 21.80.060(a)(1) and the distinct ways it uses the term "claim." The Commission concluded "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." *Id.* Under this decision, existence of a claim as an "arisen right" to workers' compensation benefits at the time of liquidation is insufficient to impose an obligation to pay upon AIGA. The "arisen right" to benefits

must be accompanied by a claim filed as a pleading prior to the "final date set by the court for the filing of claims against the liquidator…" *Id.*

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .
>
> **AS 23.30.030. Required policy provisions.** A policy of a company insuring the payment of compensation under this chapter is considered to contain the provisions set out in this section.
>
> (1) The insurer assumes in full all the obligations to pay physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, burial expenses, and compensation or death benefits imposed upon the insured under the provisions of this chapter.
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> . . . .
>
> (3) As between the insurer and the employee or the employee's beneficiaries, notice to or knowledge of the occurrence of the injury on the party of the insured employer is notice or knowledge on the part of the insurer. . . .
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> . . . .
>
> (6) All claims for compensation, death benefits, physician's fees, nurse's charges, hospital services, hospital supplies, medicines, prosthetic devices, transportation charges to the nearest point where adequate medical facilities are available, and burial expenses may be made directly against either the employer or the insurer, or both, and the order or award of the board may be made against either the employer or the insurer or both. . . .

Insurers stand in the insured employer's shoes unless the two have conflicting interests. *See Stroup v. Central Peninsula General Hospital*, AWCB Dec. No. 11-0159 (November 3, 2011); *Seley v. Pacific Log & Lumber, Ltd.*, AWCB Dec. No. 07-0033 (February 23, 2007).

**AS 23.30.005. Alaska Workers' Compensation Board**. . . .
. . . .

(h) The department shall adopt rules for all panels . . . and shall adopt regulation to carry out provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

**AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

**8 AAC 45.040. Parties**. . . .
. . . .

(d) Any person against whom a right to relief may exist should be joined as a party.
. . . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or

(2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.

(k) If claims are joined together, the board or designee will notify the parties which case number is the master case number. After claims have been joined together,

(1) a pleading or documentary evidence filed by a party must list the master case number first and then all the other case numbers;

(2) a compensation report, controversion notice, or a notice under AS 23.30.205(f) must list only the case number assigned to the particular injury with the employer filing the report or notice;

(3) documentary evidence filed for one of the joined cases will be filed in the master case and the evidence will be considered as part of the record in each of the joined cases; and

(4) the original of the board's decision and order will be filed in the master case file, and a copy of the decision and order will be filed in each of the joined case files.

(l) After the board hears the joined cases and, if appropriate, the division will separate the case files and will notify the parties. If the joined case files are separated, a pleading or documentary evidence filed thereafter by a party must list only the case number assigned to the particular injury with the employer filing the pleading or documentary evidence.

*Johnson v. Honest Bingo*, AWCB Decision No. 03-0031 (February 11, 2003) held other insurers "must" be joined to a pending claim under 8 AAC 45.040 when evidence raised and attached the §120 presumption against each successive insurer. A later decision found *Johnson* does not stand for the opposite proposition -- that is, it does not say the board must *not* join other employers if the §120 presumption does not attach. *Taylor v. Assets, Inc.*, AWCB Decision No. 09-0062 (March 31, 2009). *Accord, Russo v. State of Alaska, et al*, AWCB Decision No. 12-0180 (October 17, 2012).

> **8 AAC 45.050. Pleadings**. (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) **Claims and petitions**.
>
> > (1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.
> > . . . .
> >
> > (4) Within 10 days after receiving a claim that is complete in accordance with this paragraph, the board or its designee will notify the employer or other person who may be interested party that a claim has been filed. The board will give notice by serving a copy of the claim by certified mail, return receipt requested, upon the employer or other person. The board or its designee will return to the claimant, and will not serve, an incomplete claim. A claim must
> >
> > > (A) state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties; and
> > >
> > > (B) be signed by the claimant or a representative. . . .

"In order to join claims, the claims must be in existence. . . . Thus, where two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is *claim* joinder . . . , not simply joinder of parties in a single claim." *Alcan Electrical* v. *Redi Electric, Inc. and Hope,* AWCAC Decision No. 112 (July 1, 2009) at 14 (emphasis in original).

## ANALYSIS

**Should all Insurers be joined to Employee's claim?**

This question's analysis is guided by 8 AAC 45.040. A general rule is given in 8 AAC 45.040(d): "Any person against whom a right to relief may exist should be joined as a party." This broad language indicates joinder should be granted when the evidence does not clearly indicate the person or entity to be joined is protected from the claim. Here, the entities to be joined are successive insurers for the same Employer, and the only injury at issue is the claimed cumulative injury from 1990 through 2005. In determining whether a right to relief may exist against a person, five subsections in 8 AAC 45.040(j) must be considered: whether the person timely objected to joinder, whether their presence is necessary for complete relief and due process among the parties, whether their absence may affect their ability to protect an interest or subject a party to a substantial risk of incurring inconsistent obligations, whether a claim was filed against the person by the employee, and, if a claim was not filed, whether a defense would bar the claim if it were filed.

Insurers argue these factors work against joinder at this point mainly because Insurers filed timely objections to joinder, Employee has not filed claims against each insurer, and valid defenses would bar any such claim. Specifically, Insurers assert defenses under AS 23.30.100 and 23.30.105 would bar the claim due to Employee's failure to timely file an injury report and a claim against each insurer.

Employee argues joinder is necessary to address the case's merits and determine which insurer, if any, is liable for benefits relating to the claimed cumulative injury. Employee further argues Insurers' defenses would not bar the claim, since Employer had valid notice of the injury and a claim is not required to be filed against each insurer covering the risk from 1990 through 2005 in a cumulative injury case. A claim need only be filed against Employer.

Insurers stand in the insured employer's shoes unless the two have conflicting interests. *See Stroup v. Central Peninsula General Hospital*, AWCB Dec. No. 11-0159 (November 3, 2011); *Seley v. Pacific Log & Lumber, Ltd.*, AWCB Dec. No. 07-0033 (February 23, 2007);

AS 23.30.030. Where multiple claims arise from a single occurrence, including cumulative claims "based on a long period of aggravation or repetitious activity, such as . . . A single employment period with successive insurers," joinder is appropriate "to avoid making decisions that will have an adverse factual effect on the interests of persons not before the board, the danger of inconsistent decisions and a multiplicity of claims, and making a final award that will not end the litigation." *Alcan* at 14.

Employee has not filed claims against each insurer separately. Insurers timely objected to joinder, preserving their right to dispute the issue at a hearing. Insurers may have valid defenses barring Employee's claim, and may be able to show they are not potentially liable parties. These considerations somewhat favor arguments presented by Insurers, but are mitigated. Insurers did not cite to any statute or decisional law to support a requirement that Employee file claims against Insurers specifically rather than just against Employer. Employee filed a claim against Employer, noting CNA as Employer's insurer. This claim satisfies the Act's requirements. AS 23.30.030(6).

Insurers argue that due process requires Employee to file an individual claims against each to define the claim they must defend, citing *Alcan*. However, *Alcan* concerned a case in which Alcan, the more recent employer, had been erroneously ordered to pay compensation to Hope after prior employer Redi had successfully petitioned for Alcan to be joined as a possibly liable last injurious employer. After a hearing on joinder, the board simultaneously joined Alcan and ordered Alcan to pay interim disability compensation, although no claim had been filed against Alcan, under AS 23.30.155. *Alcan*. This surprise order of compensation against Alcan based on a hypothetical claim that might be later filed spurred the Commission's finding that Alcan had not been provided due process. It is not necessary at this point to order any compensation from Insurers, because this decision does not address the case's merits or a request for interim compensation. Joinder would only affect Insurers' rights inasmuch as they have a duty to participate. Due process was provided at the joinder stage by providing notice that joinder is sought and an opportunity to oppose it. *Alcan* does not say joinder must be denied on due process grounds in every instance; only in the specific circumstances *Alcan* addressed. Broadening *Alcan* would turn 8 AAC 45.040(j)(4) into a requirement rather than a consideration.

*Alcan* additionally noted claim joinder was the appropriate joinder method when two distinct injuries were alleged to be responsible for the disability or need for treatment. Claim joinder necessarily requires the existence of multiple claims against multiple employers, whereas party joinder can be proper in many circumstances, with or without multiple claims. The claim relevant to this joinder request is the claim for cumulative injury. It is the division's duty to serve claims, and the division will do so if additional parties are ultimately joined. 8 AAC 45.050(b)(4).

Insurers' defenses as bars to claims against them are not clearly decisive, since the statutes establishing deadlines for injury notice and claim filing require notice to Employer, or Employer's actual knowledge, rather than specifying the insurer. A claim must be filed within two years of an employee's "knowledge of the nature of the employee's disability and its relation to the employment and after disablement," unless payments have been made due to the injury without an award, in which case the last payment date starts the two-year time limit. AS 23.30.100; AS 23.30.105. The record indicates an injury report was filed on January 19, 2006 (listing the date of injury as December 30, 2005), indicating Employee's back had "developed soreness over time." Employee filed a claim on May 16, 2014 indicating soreness and pain due to repetitive lifting and relating back to the 2005 claim. Employee filed an amended claim on July 9, 2014, alleging cumulative injury may have partially or fully caused the current disability or need for treatment. Insurers' defenses are not sufficiently convincing to be dispositive on the joinder question. The fact-finders must consider whether, if a claim was not filed against the person to be joined, defenses would bar such claim. 8 AAC 45.040(j)(5). This language requires that the end result be somewhat certain, given the conditional "would" rather than terms expressing a mere possibility. A decision on joinder is not the proper method for determining the merits of defenses to a hypothetical claim unless such defenses will clearly succeed in later hearings. Defenses and evidence concerning liability require assessment at a hearing on the merits, so long as joinder is proper on other grounds.

Considerations under 8 AAC 45.040(j) do not make a convincing argument against joinder. Employee established the connection necessary to suggest Insurers are "persons against whom a right to relief may exist" by providing a medical opinion stating that Employee's work for

Employer between 1990 and 2005 is a substantial factor in Employee's current disability or need for treatment. This is sufficient to attach the presumption of compensability to Employee's claim against Employer for the years in question, and to each insurer that stands in Employer's shoes for those same periods.

AIGA's liability for compensation owed by the liquidated companies it guarantees is guided by special statute. AS 21.80.010 *et seq*. These statutes clearly indicate that AIGA is not required to pay claims filed with AIGA "after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer." AS 21.80.060(a)(1)(B). This statute has straightforward application to this case. The California order liquidating Fremont says any claims not received by June 30, 2004 (the "claim bar" date) "is conclusively deemed forever waived." AIGA filed documents showing the order was sent to Employer and Employer did not file any claims in response, presumably because Employee and Employer were not aware of the possible cumulative injury prior to the claim bar date. Employee's claims for cumulative injury were filed long after the claim bar date, and AIGA may therefore bar the cumulative claim against it. Under 8 AAC 45.040(j)(5), AIGA's joinder will not assist in determining the parties' rights because Employee has shown no way around the claim bar statute. This defense applies to AIGA generally and also to its coverage for April 1, 1996 and May 14, 1999. While these injuries were reported before the Claim Bar Date, application of the new claims in the pending case would still be barred by the Claim Bar Date and AS 21.80.060. These older injuries are separate cases, and Employee is free to seek their joinder, though he has not yet indicated a reason to do so.

While Employer's duty and ability to file a claim and associated proof by June 30, 2004 for a prior injury of which knowledge did not arise until much later raises compelling procedural and substantive due process and equal protection arguments, this decision has no authority to address those constitutional issues. For the above reasons, Employee's petition for joinder will be granted as it pertains to Liberty and AIG. Employee's petition for joinder will be denied as it pertains to AIGA.

## CONCLUSION OF LAW

Liberty and AIG should be joined as parties. AIGA should not be joined as a party.

ORDER

1) Employee's petition to join is granted as to Liberty and AIG.
2) Employee's petition to join is denied as to AIGA.

Dated in Anchorage, Alaska on July 22, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Henry Tashjian, Designated Chair

/s/
Amy Steele, Member

/s/
Mark Talbert, Member

## PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

## RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

## MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Michael J. Schwarz, employee / claimant v. K&L Distributors, employer; Fremont Indemnity Co., insurer / defendants; Case Nos. 200522394M, 201506034J; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid on July 22, 2016 .

/s/
Nenita Farmer (Office Assistant 1)