

Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and
NovaPro Risk Solutions,
Appellants,

vs.

John E. Adamson,
Appellee.

MEMORANDUM DECISION AND ORDER ON MOTION FOR ATTORNEY FEES

Decision No. 203 November 12, 2014

AWCAC Appeal No. 11-017
AWCB Decision No. 11-0141
AWCB Case No. 200815548

Appearances: Shelby L. Nuenke-Davison, Office of the Municipal Attorney, for appellants, Municipality of Anchorage and NovaPro Risk Solutions; Eric C. Croft, The Croft Law Office, for appellee, John E. Adamson.

Commission proceedings: Appeal filed September 26, 2011, with motion for stay; order on motion for stay issued January 25, 2012; briefing completed April 9, 2012; oral argument held on September 26, 2012; Final Decision No. 173 issued December 19, 2012.

Alaska Supreme Court proceedings: Petition for review of the January 25, 2012, order on motion for stay filed February 7, 2012; Opinion No. 6780 issued May 3, 2013. Petition for review of Final Decision No. 173 filed December 31, 2012; Opinion No. 6947 issued August 29, 2014.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

Procedurally, in the above-captioned matter, the claim of appellee, John E. Adamson (Adamson), went to hearing before the Alaska Workers' Compensation Board (board) on June 30, 2011. The board issued a decision on September 16, 2011,¹ that was adverse to appellants, the Municipality of Anchorage and NovaPro Risk Solutions (collectively MOA). MOA timely filed an appeal of that decision with the Workers'

¹ See *John E. Adamson v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 11-0141 (Sept. 16, 2011).

Compensation Appeals Commission (commission). The commission issued a final decision in that appeal on December 19, 2012,² and the decision was distributed that same day. The commission's decision was adverse to Adamson. Adamson timely appealed the commission's decision to the Alaska Supreme Court (supreme court). On August 29, 2014, the supreme court issued its decision, which was favorable to Adamson and adverse to MOA.³

On November 3, 2014, Adamson filed a Motion for Attorney Fees and an Affidavit of Fees Before the Alaska Workers' Compensation Appeals Commission (motion), requesting an award of attorney fees in the amount of \$21,124.50 and costs of \$419.50 in connection with MOA's appeal to the commission. MOA filed an opposition to the motion on November 5, 2014. The gist of the opposition is that Adamson's motion was not timely filed.

AS 23.30.008(d) provides:

In an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable. However, the commission may not make an award of attorney fees against an injured worker unless the commission finds that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.

Furthermore, the supreme court has held that a successful party in an appeal to the commission is one who has prevailed on a significant issue.⁴ Also, a commission regulation, 8 AAC 57.260(a), states: "A party may request an award of attorney fees and costs on appeal by filing a motion no later than 10 days after the date shown in the commission's notice of distribution of the final decision."

² See *Municipality of Anchorage v. John E. Adamson*, Alaska Workers' Comp. App. Comm'n Dec. No. 173 (Dec. 19, 2012).

³ See *Adamson v. Municipality of Anchorage*, 333 P.3d 5 (Alaska 2014).

⁴ See *Lewis-Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1068 (Alaska 2011).

MOA's appeal to the commission focused primarily on issues involving Alaska's firefighter presumption statute, AS 23.30.121. In its briefing, MOA identified the following issues on appeal: 1) Was Adamson's claim compensable under AS 23.30.121; 2) Did substantial evidence support the board's award of benefits under that statute; and 3) Is the statute constitutional? In his briefing, Adamson identified four issues: 1) Did the Alaska Legislature enact the firefighter presumption statute, AS 23.30.121, in recognition of the unique status of and risks faced by firefighters; 2) Did Adamson present substantial evidence establishing the presumption; 3) Did MOA fail to rebut the firefighter presumption; and 4) Was MOA's position on firefighter medical examinations contrary to law?

The commission, having no jurisdiction to do so, declined to address the constitutional issue. We decided the other two issues identified by MOA adversely to Adamson. Therefore, in terms of the three issues that MOA, as the appellant, litigated in the appeal, Adamson did not prevail on any of them.

As for the issues Adamson identified, two of them, whether Adamson attached the presumption and whether MOA rebutted it, were decided adversely to him. Otherwise, the first issue he identified, whether the statute was enacted in recognition of the unique job demands of firefighters, in the commission's view, is not a legal issue. It is a political statement. There never was any dispute between the parties as to the legislative intent of the firefighter presumption statute. As for the fourth issue Adamson identified, it was also decided adversely to him, as the commission concluded the MOA's position on firefighter medical examinations was not contrary to law, at least in Adamson's case.

Based on this review of the issues and how they were decided by the commission, Adamson did not prevail on a single significant issue argued to the commission. Therefore, in terms of AS 23.30.008(d) and the supreme court's decision in *Lewis-Walunga*, Adamson was not a successful party in terms of the appeal to the commission. Under the circumstances, it made no sense for him to move for an award

of attorney fees at the time the commission's decision was issued and distributed. Likely, in recognition of the futility of filing such a motion, Adamson opted not to.

The commission recognizes that Adamson's motion raises two issues: 1) When a claimant is unsuccessful in an employer's appeal to the commission, yet successful on appeal to the supreme court, is there a legal basis for the commission to subsequently grant a motion and retroactively award attorney fees to the claimant in the appeal to the commission; and 2) Is there a deadline for such a motion?

As for the first issue, the commission is unaware of any Alaska authority directly on point. Nevertheless, in *Trudell v. Hibbert*,⁵ the supreme court awarded attorney fees to the claimant in his appeal to that court pursuant to the provisions of AR 508(g)(2).⁶ However, neither the appellate rule nor the *Trudell* decision address whether the commission should award attorney fees to the claimant when the claimant is unsuccessful before the commission, but ultimately successful before the supreme court. Admittedly, there is a certain amount of logic in a claimant returning to and retroactively seeking an award of attorney fees from the commission. Had MOA not appealed the board's decision, Adamson would not have had to incur any attorney fees in connection with an appeal to the commission and would not have needed to appeal our decision to the supreme court. Moreover, given the supreme court's disposition of the matter, it could be said that Adamson was successful in the final analysis, even though he was unsuccessful in the intermediate appeal. Consequently, we conclude that the commission can award a claimant attorney fees in circumstances such as those presented here.

⁵ 299 P.3d 1279 (Alaska 2013).

⁶ AR 508(g)(2) reads:

In an administrative appeal from the Alaska Workers' Compensation Appeals Commission, full reasonable attorney's fees will be awarded to a successful claimant. Counsel for the claimant shall serve and file an affidavit of services rendered on appeal within 10 days from the date of notice of an opinion or an order under Rule 214. Objections to the affidavit of services may be filed within 7 days of service of the affidavit. An individual justice shall determine the amount of fees to be awarded.

The remaining issue is whether Adamson's motion was timely. The commission notes that its regulation, 8 AAC 57.260(a), provides for a 10-day deadline on motions for attorney fees once a final decision is issued and distributed. Similarly, AR 508(g)(2) imposes a 10-day deadline on motions for attorney fees in appeals to the supreme court from the commission. Although these provisions of law might be applied by analogy here, in the absence of a directly applicable rule or regulation, we conclude that a reasonable deadline for such motions is the most appropriate standard. And while we are not prepared to declare what a reasonable deadline would be, the more than 60 days that passed between the supreme court's issuance of its decision and Adamson's filing of his motion exceeds any reasonable deadline.

The motion is DENIED on the basis that it was not timely filed.

Date: 12 November 2014 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Laurence Keyes, Chair

I certify that this is a full and correct copy of Memorandum Decision and Order on Motion for Attorney Fees, Decision No. 203, issued in the matter of *Municipality of Anchorage and NovaPro Risk Solutions vs. John E. Adamson*, AWCAC Appeal No. 11-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 12, 2014.

Date: November 14, 2014



Signed

K. Morrison, Appeals Commission Clerk