Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and NovaPro Risk Solutions,
Appellants,

vs.

Robert Rehbock and Herb McKinney,
Appellees.

Final Decision
Decision No. 058 October 1, 2007

AWCAC Appeal No. 07-003
AWCB Decision No. 07-0016
AWCB Case No. 200318735

Appeal from Alaska Workers' Compensation Board Decision No. 07-0016, issued on January 31, 2007, by the southcentral panel at Anchorage, Darryl Jacquot, Chairman, Janet Waldron, Member for Industry.

Appearances: Trena Heikes, Law Office of Trena L. Heikes, for appellees Municipality of Anchorage and NovaPro Risk Solutions. Robert Rehbock, Rehbock and Rehbock, appellee, pro se. Herb McKinney, appellee, pro se.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

This appeal asks the commission to determine whether the board may award an attorney fee against the employer, based on work performed by the employee's attorney that resulted in negotiation of a settlement that the employee refused to sign. We conclude that because a refused, unexecuted settlement is void for any purpose, the board may not compel the employer to pay an attorney fee to the employee's attorney based on the "benefit" of a refused settlement agreement. We reverse the board's decision.

Factual background.

Herb McKinney works for the Municipality of Anchorage as an engineering assistant. McKinney reported he strained his back while lifting a case of spray paint on

November 2, 2003.[1] He saw his physician, Dr. Lewis, on November 3, 2003,[2] and, after two physical therapy sessions, he told the therapist he was "cured" and he returned to work.[3]

On January 26, 2004, he went to the clinic again, having developed pain while using his home computer. He saw Dr. Keith Laufer, who recorded in his notes "sitting at desk (MLP) onset spasm pain R side."[4] Dr. Laufer sent him to have an MRI scan.[5] He continued to have back pain, and eventually transferred his care to Susan Anderson, M.D.[6]

McKinney initially submitted the bills to his union health trust, explaining he was at home sitting at his personal computer reaching for a mouse when his back pain began.[7] McKinney's health trust refused payment of the bill as treatment for a workers' compensation injury.[8] The workers' compensation adjuster, relying on Dr. Laufer's report and McKinney's statement to the adjuster that he was working at his computer when the injury occurred, paid for McKinney's treatment and compensated him for time lost from work.[9] McKinney filed a workers' compensation claim on June 25, 2004.[10]

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1 R. 0001.

2 R. 0238. The diagnosis was "LS strain secondary to work injury."

3 R. 0233. He was discharged from physical therapy November 5, 2003. Dr. Lewis permitted him to return to work without restriction the same day. R. 0170.

4 R. 0169.

5 R. 0231. The MRI showed multilevel intervertebral disc degeneration, with disc desiccation and circumferential intervertebral disc bulge, but no evident focal disc protrusion, spinal canal stenosis, or limiting intervertebral foraminal narrowing.

6 R. 0160.

7 R. 0053.

8 R. 0061.

9 Hrg. Tr. 10:3-19.

The employer's answer to the claim stated that no physician had indicated a time loss greater than three days, no permanent impairment rating had been received, and all medical bills received had been paid.[11] On October 29, 2004, the employer controverted further medical treatment and compensation payments based on a report by Drs. Green and Stump.[12] The employer asserts it over paid $9,000 in benefits and compensation to McKinney.[13]

McKinney retained Rehbock, who filed a second workers' compensation claim for permanent partial disability compensation and medical benefits on November 24, 2004.[14] The employer controverted this claim on December 23, 2004.[15] At a pre-hearing conference on January 24, 2005, McKinney disclosed that the computer incident occurred at his home,[16] but he maintained that the January 2004 incident was connected to his November 2, 2003, work injury. The employer took McKinney's deposition.[17] On June 16, 2005, McKinney's physician signed an affidavit stating that the November 2, 2003, injury was a temporary, short-term aggravation of his pre-

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[10] R. 0006-07. He asked for temporary partial disability compensation, permanent partial disability compensation, additional medical benefits, penalty, and interest.

[11] R. 0008.

[12] R. 0002.

[13] Hrg. Tr. 11:6. The board's record contains a statement for treatment from May 17, 2004, through March 3, 2005, by AA Pain Centers totaling $38,817.66. R. 0040-43.

[14] R. 0009-12.

[15] R. 0004.

[16] Hrg. Tr. 10:12-14. The board's record reflects only one pre-hearing conference prior to Rehbock's petition, on January 24, 2005. R. 0260-261.

[17] *Herb L. McKinney v. Municipality of Anchorage,* Alaska Workers' Comp. Bd. Dec. No. 07-0016, 2 (January 31, 2007). Although the board's record contains copies of notices of McKinney's deposition, R. 0030, 0034, his deposition was not included in the record.

existing back condition and that the treatment after January 24, 2004, was not related to the prior work injury on November 2, 2003.[18] Based on this affidavit, the employer additionally controverted the treatment McKinney had received between May 17, 2004, and September 21, 2004.[19] McKinney's union health trust thereafter began coverage of treatment for the January 2006 injury.[20]

To resolve any outstanding issues related to reimbursement, the parties negotiated a settlement, beginning in April 2006.[21] The settlement terms provided the municipality waived reimbursement of the asserted overpayment from McKinney or the health trust, McKinney waived future benefits for the November 2, 2003, injury, and Rehbock would receive an attorney fee of $4000. After a meeting in July 2006, McKinney refused to respond to his counsel's efforts to contact him or sign the agreement,[22] so the parties did not submit it to the board for approval.

Board proceedings on Rehbock's petition.

In October 2006, Rehbock petitioned the board for attorney fees paid by McKinney.[23] His petition stated:

> Robert A. Rehbock, Attorney at Law, petitions the Board pursuant to 8 AAC 45.180. Costs and attorney fees (c)(d)(1)(2) [*sic*] for an award of fees and costs to be paid by Employee, Herb L. McKinney in the amount of $4,000.00. See Affidavit of Robert A. Rehbock in support of said Petition for an award of fees and costs to be paid by Employee, Herb L. McKinney.[24]

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18 R. 0244-47.

19 R. 0005.

20 AWCB Dec. 07-0016 at 2, Hrg. Tr. 5:15-16; 11:1-5.

21 R. 0101.

22 R. 0101, Hrg. Tr. 7:13-14.

23 R. 0098-99. He also withdrew as McKinney's counsel. R. 0089-90.

24 R. 0099. The commission reads the petition to refer to 8 AAC 45.180(c)(1) and (d)(2), which provide in pertinent part:

At hearing on the fee petition, Rehbock said he had "done services necessary so this man had some coverage for something that through misunderstandings was not initially covered by the correct provider and, in fact, by any provider initially."[25] He found "no law that allows the board to order that Mr. McKinney pay my fees directly out of his pocket except through workers' comp. benefits."[26] He believed that AS 23.30.145

> (c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. A request for approval of a fee to be paid by an applicant must be supported by an affidavit showing the extent and character of the legal services performed. Board approval of an attorney fee is not required if the fee
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> (1) is to be paid directly to an attorney under the applicant's union-prepaid legal trust or applicant's insurance plan; or
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> (2) is a one-time-only charge to that particular applicant by the attorney, . . . without entering an appearance . . . .
>
> (d) The board will award a fee under AS 23.30.145 (b) only to an attorney licensed to practice law under the laws of this or another state.
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> (1) A request for a fee under AS 23.30.145 (b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, . . . Failure by the attorney to file the request and affidavit . . . is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145 (a), if AS 23.30.145 (a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.
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> (2) In awarding a reasonable fee under AS 23.30.145 (b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

[25] Hrg. Tr. 6:9-12.

[26] Hrg. Tr. 6:24-7:1.

would support an award of payment by McKinney.[27] The Municipality appeared and reviewed the history of the claim and settlement negations, concluding,

> The problem was Mr. McKinney opted not to sign [the settlement agreement] and the City, because it's not going to get anything in re – in exchange for payment of attorney's fees, pulled out of any ag – any obligation to pay attorney's fees at that point. That prompted Mr. Rehbock to file the petition. The City still has a claim of an overpayment of $9,000 in medical and disability benefits . . . . I see no basis to order the Municipality to pay attorney's fees in this case when clearly there's been overpayment, they should have never paid anything . . . . Mr. McKinney's filing of a claim actually worked to the benefit for the City because it was finally able to get to the bottom of it and find out that it never should have been paying from the beginning. So we take no position with respect to this.[28]

The board's decision states:

> We find that the employer controverted and otherwise resisted paying the employee medical and timeloss benefits associated with his back condition. We also find that, even though the employee's claim was ultimately shown to not be a workers' compensation injury, the employee enjoyed the benefit of approximately $9,000.00 that he would not have otherwise timely received. We find Mr. Rehbock provided valuable services on behalf of the employee which ultimately resulted in a benefit to the employee, to wit, a drafted C&R. We recognize the employee has refused to sign the C&R and it remains to be executed, and the employer is deprived of full "closure" to the employee's November 2003 back strain, but we still find and conclude that Mr. Rehbock's representation has resulted in benefits to the employee. Accordingly, we find we can award a fee under AS 23.30.145.[29]

The board then found the parties had previously negotiated a reasonable fee of $4000. The board stated it recognized

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[27] Hrg. Tr. 8:17-24.

[28] Hrg. Tr. 12:5-21.

[29] *Herb L. McKinney,* Alaska Workers' Comp. Bd. Dec. No. 07-0016 at 3.

> that the employer is deprived [of] full "closure" in its bargain, based on the employee's refusal to execute the C&R. Nonetheless, we recognize that Mr. Rehbock's representation did in fact benefit the employee, and to a certain degree, the employer. Based on the unique facts of this case, and the inequities facing both Mr. Rehbock and the employer, we find a reasonable fee, at this juncture, to be $2,000.00.[30]

The board then ordered the employer to pay the attorney fee of $2000 to Rehbock and reserved jurisdiction to award additional fees "should additional fees become appropriate in the future."[31]

Standard of review.

The Alaska State Legislature directed the commission to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[32] In doing so, we are bound by the board's determination of the credibility of a witness who appears before the board.

The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[33] The commission is required to exercise its independent judgment on questions of law and board procedure.[34]

Discussion.

This appeal presents the vexing conundrum facing attorneys who perform work in workers' compensation cases that results in a collateral benefit to their clients, but it is determined that the workers' compensation claim is not compensable and no further compensation is due. The attorney has performed work resulting in collateral aid to the

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30 Alaska Workers' Comp. Bd. Dec. No. 07-0016 at 4.

31 Alaska Workers' Comp. Bd. Dec. No. 07-0016 at 4.

32 AS 23.30.128(b).

33 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

34 AS 23.30.128(b).

client, albeit not a successful claim, but who is to pay the attorney? The board attempts to resolve this dilemma by requiring the employer to pay the employee's attorney based on its finding of a collateral benefit to the employee, the inequity of the circumstances, and an incomplete benefit to the employer. We believe the board's solution is not supported by AS 23.30.145.

We begin with the principal that the employer's liability for attorney fees is based upon the employer's liability for workers' compensation to the employee. The board has no power to award fees against an employer where there is no employer liability under AS 23.30 for an injury to an employee. The board may not assert jurisdiction over a dispute because an employer denied an employee the right to write a letter to a newspaper, made derogatory remarks about his religious practices, interfered with his union rights, collided with his truck, or trespassed on his property. The board is thus powerless to order the employer to pay an attorney to assist the employee to obtain damages for trespass, resolve his auto insurance claim, pursue a union grievance, file a complaint with the equal employment opportunity commission, or seek court enforcement of his constitutional rights. The existence of an employment relationship alone is not enough to impose liability for workers' compensation on the employer in such cases, or for attorney fees under AS 23.30.145, notwithstanding an attorney's success obtaining a benefit connected to the employment.

The board may not award fees against an employer in a workers' compensation claim except as provided in AS 23.30.145(a) or (b). An award of fees represents an order to pay directed against an employer. If not paid on time, it can result in severe penalties, including criminal penalties if the employer has failed to secure the payment of the award.[35] A board award of attorney fees may be recorded as a lien on the employer's property[36] and, if the employer defaults on payment of the awarded fee, the board's award may be enforced by the Superior Court through seizure of the employer's

[35] AS 23.30.155(f), AS 23.30.255.

[36] AS 23.30.165.

property.[37] In short, the consequences of a board award of attorney fees are such that the legislature limited the board's power to compel the employer to pay the employee's attorney.

On the other hand, the legislature created in AS 23.30.145 a contingent fee system[38] designed to ensure access to attorneys for litigation of workers' compensation claims.[39] An injured worker who is denied compensation need not consume savings to file a claim for compensation and, if the worker's attorney is successful, the awarded compensation will not be reduced by the attorney's fee. Fees awarded under AS 23.30.145 reflect the contingent nature of the attorney's payment, and are intended to provide reasonable and fully compensatory fees.[40] Nonetheless, beyond the subsidy inherent in a contingent fee system, AS 23.30.145 is not designed to require employers to pay employee attorneys who do not obtain an award of compensation, or whose services are provided in an unsuccessful claim.[41]

1. A fee may not be ordered under AS 23.30.145(a) if no compensation is awarded.

The board may award attorney fees against an employer under AS 23.30.145(a) as a percentage on the amount of benefits awarded to an employee when an employer has controverted the employee's claim.[42] Such fees may be allowed "only on the

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[37] AS 23.30.170.

[38] *State, Dep't of Revenue v. Cowgill,* 115 P.3d 522, 525 (Alaska 2005) ("employees' attorney's fees are, by statute, contingent upon success.").

[39] *Harnish Group, Inc., v. Moore,* 160 P.3d 146, 152 (Alaska 2007) (holding that "claim" in section 145 means the written application for benefits filed by an employee).

[40] *Cowgill,* 115 P.3d at 524 ("the objective in worker's compensation cases 'is to make attorney fee awards both *fully compensatory and reasonable* so that competent counsel will be available to furnish legal services to injured workers.'") *quoting Wise Mechanical Contractors v. Bignell,* 718 P.2d 971, 973 (Alaska 1986).

[41] *Bouse v. Fireman's Fund Ins. Co.,* 932 P.2d 222, 243 (Alaska 1997); *Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184, 1193 (Alaska 1993).

[42] *Harnish Group, Inc.,* 160 P.3d at 150.

amount of compensation controverted *and awarded*."[43] If there is no award of compensation on a controverted claim, an attorney is not entitled to a fee under AS 23.30.145(a).

In this case, the board found the Municipality had "controverted and resisted" payment of compensation to McKinney. We agree that there is substantial evidence in the record that the Municipality controverted payment of compensation to McKinney. Although the Municipality controverted benefits and McKinney filed a claim, the board awarded no compensation to McKinney. The Municipality had no liability for workers' compensation because the "employee's claim was ultimately shown to not be a workers' compensation injury." Compensation was not awarded on the employee's claims, so, to the extent that the board based its award of attorney fees on AS 23.30.145(a), the board erred as a matter of law.

Similarly, the board may only direct payment by a person other than the employer in the very limited circumstances provided in AS 23.30.145(a).[44] The board did not find such circumstances exist in this case. We agree the record is devoid of evidence that would support such a finding. We conclude the board also was not authorized to award an attorney fee "out of the compensation awarded."

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[43] *Bignell v. Wise Mechanical Contractors,* 651 P.2d 1163, 1169 (Alaska 1982) (emphasis added).

[44] "When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded." This provision may be used to award fees, for example: to establish a conservatorship to receive uncontroverted permanent total disability compensation for a worker who is no longer competent to receive compensation payments, AS 23.30.140, or for services to a dependent married child beneficiary whose death benefits are not controverted or resisted by the employer, but are unsuccessfully contested by the deceased workers' spouse at the time of injury.

2. The board erred by awarding attorney fees under AS 23.30.145(b) because there is no evidence to support a finding of successful prosecution of a claim.

The board may award fees against an employer under AS 23.30.145(b) when an employer delays or otherwise resists payment of compensation and an employee retains an attorney in "the successful prosecution of his claim." Awards under AS 23.30.145(b) must be based on the successful prosecution of the claim and reflect the degree of the employee's success.[45] In this case, the claims were not successful because, "it was shown not to be a workers' compensation injury." The board found that the employee "enjoyed the benefit of $9,000 he would not otherwise have timely received." Our review of the record reveals no evidence in the record that the employee would "otherwise" not have been paid $9,000 (to which the board concedes he was not entitled) if his attorney had not made efforts on his behalf. There was no testimony that Rehbock guided McKinney in his interactions with the adjuster prior to June 25, 2004, when McKinney filed his first claim, or induced the adjusters to initiate or extend payments later found to be erroneous.[46] We conclude there is no substantial evidence,

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[45] *Bouse,* 932 P.2d at 242 ("In order to recover fees under AS 23.30.145(b), a worker must succeed on the claim."); *Childs,* 860 P.2d at 1193.

[46] The board proposes that an attorney's efforts to induce an employer to pay benefits (to which the employee is later found not entitled) should be rewarded by an award of fees on the grounds that compensation mistakenly paid cannot be recovered from the employee, or the employee "has the use" of the compensation, even if the board dismisses the claim as not work-related. However, such a rationale disregards the plain language of AS 23.30.145(b) that requires a finding that the attorney was employed "in the *successful* prosecution of the claim." An employee's ability to retain money mistakenly paid by the employer in the absence of liability is the result of operation of law, AS 23.30.155(j), not the attorney's successful prosecution of the employee's claim. Successful prosecution means that the attorney established the employee's legal right to the claimed compensation through unequivocal admission, settlement, or award. The legislature's requirement of successful prosecution of a claim for fee awards under AS 23.30.145(b) avoids paying attorneys to induce mistaken payments. The requirement forestalls institution of practices that are an invitation to violation of the attorney's duty of candor toward the tribunal, Alaska Rule of Professional Conduct 3.3, and of fairness to an opposing party and counsel, Alaska Rule of Professional Conduct 3.4.

in light of the whole record, to support the board's finding that the benefit ($9,000 mistakenly paid) would not have been tendered to McKinney and his physicians but for his attorney's efforts.[47]

The board also found that the "drafted C&R" was a benefit to the employee. The board stated the agreement "remains to be executed," using the intransitive verb "to remain" to mean that the agreement continues, endures, or awaits action. The board's description of the agreement as one that "remains to be executed" means the board found the agreement *exists* and the parties will sign it in the future. We find no evidence in the record that after the employee rejected the settlement, the parties still intended to settle the claim, or that the draft agreement represented anything but a rejected attempt at settlement. Indeed, the employee stated in the hearing that "I don't believe that I should sign a release."[48] There was no evidence in the record that the employee's rejection was conditional, that the employer continued to hold the offer open, or that the parties were continuing to negotiate.[49] We find no evidence to support the board's characterization of the agreement as one that remains in existence.

The board's characterization of an unexecuted, rejected agreement as a "benefit" obtained through successful prosecution of a claim is contrary to AS 23.30.012(a), which provides that an agreement not in a form prescribed by the director and filed in the division is "void for any purpose."[50] An unsigned agreement does not meet the

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[47] For examples of evidence supporting the board's authority to award a reasonable fee under AS 23.30.145(b) for assistance provided to a claimant "for about a year before PTD benefits were paid" upon filing a claim, despite an absence of controversion, see *Harnish Group,* 160 P.3d at 154.

[48] Hrg. Tr. 13:16.

[49] The Municipality agreed "we prefer a compromise and release," but its attorney clearly stated the Municipality "should never have paid anything." Hrg Tr: 12:16-17, 12:22-23. McKinney's position was equally clear: "I won't do that [waive future benefits]. You can just get that out of the way right now. And I guess we'll proceed with another counsel as soon as I can procure one." Hrg. Tr. 19:21.

[50] *See also Lindekugel v. Fluor Alaska, Inc.,* 934 P.2d 1307 (Alaska 1993) (verbal agreement to dismiss claim is void); *but see Cole v. Ketchikan Pulp Co.,* 850

form prescribed by regulation 8 AAC 45.160(b). A void agreement is one annulled, having no legal force. If an agreement is "void for any purpose," it cannot serve as the basis for a board award of attorney fees against an employer, because it cannot establish any right or benefit for the employee. Moreover, it cannot be enforced, even in part, as it appears the board may have been attempting to do by awarding only half the amount agreed on in the rejected settlement.[51]

The board cited another "benefit" as the basis for an award of fees against the employer. The board stated that Rehbock's efforts had "to some extent benefitted the employer."[52] We find no evidence in the record that Rehbock's services were directed at anything less than the zealous representation of his client's interests. The fact that his efforts to obtain workers' compensation were not successful is attributable to the opinion of the employee's physician and his client's disclosure that the computer in question was his personal home computer – not one at work. When a represented claimant's injury is shown not to arise out of employment, any represented employer may be said to "benefit" insofar as the discovery process may be more orderly when all parties are represented. Certainly, the employer received no monetary or other concrete benefit through Rehbock's services. If we accept the board's justification for

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P.2d 642 (Alaska 1993) (remanding to board to determine if the board's filing requirement may be waived in case of employee who died before signing settlement agreement that had been signed by employer).

[51] As justification for an award of fees against the employer, the board referred to the "inequities facing Mr. Rehbock and the employer" without describing precisely what those inequities were. The board appears to have deducted part of the agreed fee because the employer did not get the "closure" it wanted from the agreement. It appears the board sought to enforce a void agreement between Rehbock and the Municipality, notwithstanding that the agreement was (1) between McKinney and the Municipality and (2) void for any purpose.

[52] The Municipality's attorney said, "Mr. McKinney's filing his claim and obtaining counsel actually worked as a benefit for the City because it was finally able to get to the bottom of it and find out that it never should have been paying." Hrg. Tr. 12:18-21. The "benefit" (discovery that McKinney's treatment was not for a work-related injury) was the result of the City's defense of the claim, not the filing of the claim.

an award of fees against the employer, employee attorneys would be paid by the employer win or lose, contrary to the contingent fee scheme of AS 23.30.145.

We find the record lacks substantial evidence on which the board could base an award of attorney fees against the employer. We conclude the board erred as a matter of law by using a void agreement as a "benefit" on which attorney fees may be based. We find no award of compensation was made to the employee, nor was the employee's claim successfully prosecuted by Rehbock. We conclude the board erred as a matter of law in ordering the employer to pay an award of attorney fees to the employee's attorney under AS 23.30.145(b).

3. The board lacks authority to order payment of fees for services collateral to a workers' compensation claim.

AS 23.30.145 provides the *only* mechanism for a board award of attorney fees; it is Rehbock's only recourse for board-ordered payment of services rendered in the prosecution of the employee's claim for workers' compensation. However, Rehbock was not seeking payment for services advancing the employee's workers' compensation claim, but because McKinney's union health trust was induced, through his efforts, to start paying for McKinney's medical care. In other words, he asked the board to direct McKinney to pay him because he resolved McKinney's health insurance coverage dispute. Aside from the lack of board jurisdiction over such disputes, it is not fair to order the employer to pay for such services, because, unlike controverted, delayed, or resisted payment of compensation benefits, the employer's response to the workers' compensation claim has not "created the employee's need for legal assistance."[53]

Rehbock's petition cited 8 AAC 45.180(c), which sets out the process for obtaining approval of a fee to be paid by the employee. The interaction between AS 23.30.145 and .260 was clarified by the Supreme Court's decision in *Harnish,* construing the word "claim" in AS 23.30.145 to mean the written application for benefits. AS 23.30.145 applies to fees for legal services rendered in respect to a claim

[53] *Underwater Constr., Inc. v. Shirley,* 884 P.2d 156, 159 (Alaska 1994) *quoting Haile v. Pan American World Airways, Inc.,* 505 P.2d 838, 842 (Alaska 1973).

– a written application for benefits – including a claim that is filed after the initial services are rendered, so long as the services are "in respect to" the claim. In other words, for employee attorney services in respect of a litigated claim or written application for benefits, the only source of payment is the contingent fee agreement established by AS 23.30.145.

Approval of a fee protects the attorney from violation of AS 23.30.260(a)(1) and serves to permit attorneys to seek payment for services rendered "with respect to a claim" when the claim is not controverted, delayed or otherwise resisted, or is not filed after all. It assures that attorney compensation for the work of assisting injured workers is regulated when a claim is uncontested.[54] Read together, AS 23.30.145 and .260 act to insure that (1) the attorney payment for litigation of claims in workers' compensation is a contingent fee, (2) in successfully litigated claims, the employee's attorney is compensated at the employer's expense, but, (3) excessive attorney fees are not charged for services with respect to an injured worker's claim if there is no litigation, resistance to or delay in payment, or controversion.[55]

The board's authority is limited to approval or awards of a fee, not to enforcement of the attorney services contract.[56] The board has no authority, except as

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[54] The commission is aware that attorneys who practice workers' compensation also provide related services that do not entail workers' compensation claim litigation, or where claims are never filed. Collateral issues related to workers' compensation have grown more complex, (e.g., overlapping rights under other federal and state legislation, Medicaid, health trust and private insurance liens, fraud, collections, conservatorships, structured settlements in third party cases, disputed familial status, overseas payment of benefits, social security or other disability insurance, etc.), but if attorneys are barred completely from payment for such collateral services, it is unlikely that attorneys will provide them to injured workers.

[55] AS 23.30.260(b) exempts a one-time-only charge of $300 to employees from approval or board order for attorney services rendered with respect to a claim, provided the attorney does not enter an appearance.

[56] Rehbock stated he had a contract with his client "within workers' comp. and I have no contract and he has no obligation to pay for services except as may be ordered through the board." Hrg. Tr. 9:3-5. However, the board has no power to

provided in AS 23.30.145(a), to *order* an employee to pay an attorney fee for advice. It is for the courts, not the board, to decide whether an attorney may bring a collection action for attorney services parallel or collateral to a workers' compensation claim, or, once the attorney obtains board approval of the fee, with respect to a claim that is not controverted, delayed or resisted.

Conclusion.

The board lacked substantial evidence on which to base a finding that Rehbock successfully prosecuted McKinney's claim for benefits, or a finding that the board had awarded compensation to McKinney. We conclude the board erred as a matter of law by ordering the Municipality to pay an award of attorney fees to Rehbock for services in McKinney's claim. We therefore REVERSE the board's decision No. 07-0016.

Date: *1 October 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission reversed the board's decision on Robert Rehbock's petition for an attorney fee in Herb McKinney's workers' compensation claim. The appeals commission's decision ends all administrative proceedings on the petition for attorney fees. It becomes effective when filed in the office of the appeals commission unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is filed and be brought by a party-in-

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enforce an obligation on McKinney to compensate Rehbock for his services in resolving McKinney's dispute with his health trust.

interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. To see the date this decision is filed, look at the clerk's Certification below.

A request for commission reconsideration must be filed within 30 days of the date of service of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal this decision to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of Final Decision No. 058 issued in the matter of *Municipality of Anchorage v. Robert Rehbock and Herb McKinney.*, Appeal No. 07-003; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this *1st* day of *October*, 20*07*.

Signed
L. Beard, Deputy Appeals Commission Clerk

Certificate of Service
I certify that a copy of this Final Decision in AWCAC Appeal No. 07-003 was mailed on *10/1/07* to McKinney (certified) , Heikes, & Rehbock at their addresses of record and faxed to Heikes, Rehbock, Director WCD, & AWCB Appeals Clerk.

Signed *10/1/07*
L. Beard, Deputy Clerk Date