

Alaska Workers' Compensation Appeals Commission

Linda Rockstad,
Movant,

vs.

Chugach Eareckson, Zurich American
Insurance Co. and Novapro Risk
Solutions,
Respondents.

Memorandum Decision

Decision No. 108 May 11, 2009

AWCAC Appeal No. 08-033
AWCB Decision No. 08-0208
AWCB Case No. 200320305

Motion for Attorney Fees on Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision No. 08-0208 issued on November 6, 2008,¹ by southcentral panel members Janel Wright, Chair, Linda Hutchings, Member for Industry, and Patricia Vollendorf, Member for Labor.

Appearances: Linda Rockstad, pro se, movant.² Robert Bredesen, Russell, Wagg, Gabbert & Budzinski, for the respondents, Chugach Eareckson, Zurich American Ins. Co. and Novapro Risk Solutions.

Commission proceedings: Motion for Extraordinary Review filed November 18, 2008. Motion to Accept Late Filed Motion for Extraordinary Review filed November 21, 2008. Motion for Leave to be Assisted by a Person Who is Not an Attorney and Motion to Accept Late Filed Motion for Extraordinary Review granted by commission order December 17, 2008. Oral argument on Motion for Extraordinary Review presented on January 21, 2009. Final Decision on Motion for Extraordinary Review issued

¹ *Linda Rockstad v. Chugach Eareckson Support Servs.*, Alaska Workers' Comp. Bd. Dec. No. 08-0208 (Nov. 6, 2008), modified, *Linda Rockstad v. Chugach Eareckson Support Servs.*, Alaska Workers' Comp. Bd. Dec. No. 08-0237 (Dec. 3, 2008) (correcting date in footnote 38, clarifying a reference to handwriting on a medical record, and affirming Bd. Dec. No. 08-0208 in other respects).

² Ms. Rockstad was assisted by Mary Thoeni.

February 20, 2009.³ Motion for Attorney Fees and Costs filed February 27, 2009. Answer to Respondents' Motion for Attorney Fees and Costs filed March 5, 2009. Commissioners: David Richards, Stephen Hagedorn, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

1. Introduction.

The movant filed a motion for extraordinary review of an interlocutory order denying various petitions. The movant asserted that an important question of law on which there are grounds for differing opinions presented in her motion respecting (1) the board's obligation to assure the contents of the binders are reliable scientific evidence; (2) the board's authority to determine the truth or falsity of the report before it is provided to the examiner; and, (3) whether an oral stipulation is binding on the parties. The movant also asserted that the board disregarded its regulations in refusing to sanction the employer's discovery violations, presenting an issue that would otherwise evade review, and that the board's order denied her due process because 8 Alaska Admin. Code 45.092(i) requires her to prepay the examiner's deposition fees, without a right to obtain a fee waiver as an indigent person. The respondents opposed the motion for extraordinary review and announced that, because they considered the motion frivolous and taken in bad faith, they would seek attorney fees.⁴

The commission denied the motion for extraordinary review.⁵ Respondents now seek attorney fees based on the commission's decision in *Sourdough Express, Inc. v.*

³ *Rockstad v. Chugach Eareckson*, Alaska Workers' Comp. App. Comm'n Dec. No. 100, 2009 Westlaw 493678 (Feb. 20, 2009).

⁴ Resp'ts' Qualified Non-Opp'n & Notice to Seek Att'y Fees & Costs.

⁵ The petitions sought to stay a Second Independent Medical Evaluation (SIME), to delete reports of employer medical evaluations from the binder provided to the examiner, and to certify the employer to the Superior Court for contempt for failure to comply with discovery requests.

Barron.⁶ In that case, the commission held that a controversion filed in bad faith is a legal defense to the two-year time-bar period in AS 23.30.110(c), but that the board failed to make findings of fact sufficient to support a conclusion that the employer's controversion of the employee's claim was filed in bad faith.⁷ The commission held that the board could not subject the employer to penalty for a bad faith controversion unless, "after drawing all permissible inferences from the evidence in favor of a facially valid formal controversion, the board finds that it lacks *any* legal basis or that it was *designed* to mislead or deceive the employee."⁸ On the basis of this test for bad faith, the respondents argue that the movant's motion was in bad faith because it lacked any legal basis and was dishonestly conducted.⁹ The respondents also describe the commission's holding in *Sourdough Express* as "necessarily result[ing] in a conclusion that Movant was, at minimum, honestly mistaken with respect to her litigating positions. This renders the appeal frivolous, in turn entitling Respondents to a fee award."¹⁰

The movant argues that the respondents are represented by an attorney, so they "should be held to a standard of conduct which is much higher than that required of a pro se litigant."¹¹ In addition to arguing that there was legal merit to her motion for extraordinary review, she argues that the respondents are more at fault for alleging that the movant committed fraud, which was not an issue properly before the commission, and therefore the respondents, not movant, are acting in bad faith.¹²

The arguments of the parties require the commission to address its holding in *Sourdough Express, Inc. v. Barron*. The commission may take evidence and make findings of fact in deciding motions for attorney fees. The commission must determine

⁶ Alaska Workers' Comp. App. Comm'n Dec. No. 069, 2008 Westlaw 400717 (Feb. 7, 2008).

⁷ App. Comm'n Dec. No. 069 at 21-22.

⁸ *Id.*

⁹ Resp'ts' Mem. in Support of Mot. for Att'y Fees & Costs, 8.

¹⁰ *Id.*

¹¹ Answer to Resp'ts' Mot. for Att'y Fees & Costs, 2.

¹² *Id.* at 4.

if there is substantial evidence to support a finding that the movant acted in bad faith by filing her motion. The commission must decide if her motion was frivolous or unreasonable as a matter of law. The commission must also decide if the movant is subject to a lower standard of conduct than a represented party.

The commission concludes that its holding in *Sourdough Express, Inc. v. Barron* does not require the commission to find that movant filed her motion in bad faith or that her positions were frivolous. The commission finds no evidence that the movant initiated commission proceedings in bad faith. Although mistaken, incomplete, and ultimately unpersuasive, the positions movant took in her motion were not frivolous or unreasonable as a matter of law. Finally, the commission holds that a self-represented litigant is held to the same standard of conduct before the commission and the board as a represented litigant and that a liberal interpretation of a self-represented litigant's pleadings does not include liberal acceptance of a self-represented litigant's courtesy, disrespect, or dishonesty toward the tribunal and does not excuse failure to cooperate with the tribunal's orders and regulations.

2. Discussion.

The commission may take evidence and make findings of fact on motions for attorney fees.¹³ In order to award fees against an injured employee, the commission must conclude that the positions taken by the employee were "frivolous or unreasonable" as a matter of law, or find as a matter of fact that an appeal was filed in bad faith.¹⁴ When the commission makes findings of fact concerning attorney fees, it

¹³ AS 23.30.128(c).

¹⁴ 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.

must rely on substantial evidence, that is, evidence that a reasonable mind might rely on when reaching a conclusion.¹⁵ The party seeking an award of attorney fees from the commission bears the burden of proof and persuasion. The movant does not dispute that the respondents are the successful party in the commission proceedings on her motion for extraordinary review.

a. The respondents misinterpret the commission's holding in Sourdough Express, Inc. v. Barron.

In *Sourdough Express, Inc. v. Barron*, the commission noted that a penalty is exacted under *Harp v. ARCO Alaska*¹⁶ when it is unfair or frivolous, not merely when it is filed in bad faith.¹⁷ The commission noted the Supreme Court distinguishes between the two. Conduct that is frivolous (filing a suit without a legal basis) may also be done in bad faith (filing a suit without any legal basis for improper motive). The commission's decision sought to provide a test to distinguish bad faith conduct.

The commission's emphasis of the word "*any*" in its two part test of what constitutes a bad faith controversy was intended to convey such a complete absence of legal basis for a controversy that, *even with every inference drawn in favor of validity*, there is no possibility of mistake, misunderstanding, partial evidentiary support, or other conduct falling in the borderland between bad faith and good faith. A licensed adjuster who files such an utterly frivolous controversy may be presumed to have done so in bad faith without proof of malign motive because the adjuster possesses a state license that (1) requires specialized education, training, and experience and (2) obligates the adjuster to meet certain performance standards related to professional responsibility.¹⁸ The commission's *Sourdough Express* test does not equate frivolity with bad faith.

¹⁵ *Grainger v. Alaska Workers' Comp. Bd.*, 805 P.2d 976, 977 n. 1 (Alaska 1991).

¹⁶ 831 P.2d 352 (Alaska 1992).

¹⁷ App. Comm'n Dec. No. 069 at 20.

¹⁸ See AS 21.27.410(a)(8), providing for revocation or suspension of a license "if the licensee exhibits conduct [of affairs under a license] considered by the

The respondents argue that the commission's broad description of the borderland between good faith and bad faith implies that all conduct falling in the borderland is necessarily frivolous or unreasonable. The commission's decision was focused on defining bad faith controversies, not frivolous or unfair controversies. The commission did not hold, as the respondents suggest, that "positions were unfair or frivolous when they arise from mere honest mistakes or even typographical errors."¹⁹ By saying that "clearly fairness and sufficient evidence to support the controversy are marks of good faith,"²⁰ the commission did not exclude all other "marks of good faith." The commission's use of the word "clearly" was intended to establish the farthest range between what is affirmatively "good" and what is undoubtedly "bad," recognizing that between the two poles is a borderland of conduct that may not be one or the other. Such conduct may be neutral (such as a mistake that is not of the adjuster's making or a misunderstanding shared by the parties), well-intentioned but mistaken, or careless, but not "bad." Some conduct in that borderland may be unfair, some conduct may result in a frivolous controversy, but to say that the commission held that all conduct in the borderland is unfair or results in frivolous controversies misreads the commission's holding.

- b. There is insufficient evidence to find movant's motion was filed in bad faith and insufficient reason to conclude movant's positions were frivolous or unreasonable.*

The respondents did not present evidence that the movant acted in bad faith by filing her motion. The respondents rely on board findings regarding the movant's conduct before the board as the basis for their motion for attorney fees, but they presented no evidence that the movant intended to do anything more than seek the commission's review of the board's decision when the motion for extraordinary review was filed. While the respondents assert that the explanation for the movant's conduct

director to reflect incompetence or untrustworthiness, or to be a source of potential injury and loss to the public."

¹⁹ Resp'ts' Mem. in Support of Mot. for Att'y Fees, 8.

²⁰ App. Comm'n Dec. No. 069 at 20.

is an intent to delay the Second Independent Medical Examination or a hearing, there is no *evidence* that the purpose of the motion was to delay board proceedings on her case. The commission does not take jurisdiction from the board until a motion for extraordinary review is granted, so there could be no certainty that the board would delay the hearing or the Second Independent Medical Examination.

Respondents urge that, in oral argument, the movant seemed to disavow her challenge to the board's order on inclusion of the respondents' medical examiners' reports when she said she wanted all the evidence to come in. However, on questioning the movant did not withdraw her conditions on admission of the medical evidence. Thus, the commission cannot find that she persisted in arguing a position she had abandoned in fact. There is no evidence that the movant's purpose was to vex or harass the respondents or that the movant filed the motion for extraordinary review to obtain an advantage in another proceeding.

The respondents also assert that the movant's motion was frivolous or unreasonable. The movant responds that the questions asked of the respondents during oral argument demonstrate that the motion was not unreasonable or frivolous.²¹

The commission concluded it would not grant movant's motion for extraordinary review. The movant failed to persuade the commission, but that does not mean that her motion failed to assert some colorable legal arguments. Arguments that are mistaken or incomplete, or simply unpersuasive, are not necessarily frivolous or unreasonable as a matter of law. A movant must exercise judgment and reason to understand that a particular mistake of fact or legal error by the board is not likely to result in a grant of review or to recognize that an interlocutory board ruling on evidence does not necessarily convert the possibility of an adverse hearing outcome to a certainty. The movant may not have exercised good judgment in deciding to file her motion. Her choice to pursue remedies before the board without regard to the likely outcome may be unreasonable. However, it is the positions asserted in the motion

²¹ The movant's response is without merit. The commission's questioning in oral argument is not a commentary on the merits of the arguments presented.

before the commission that must be “frivolous or unreasonable” to support an award of attorney fees from the commission – not the movant’s decision to file a motion for extraordinary review. The motion asserted some colorable legal arguments in support of extraordinary review, therefore, it was not so lacking in legal basis as to be frivolous or unreasonable.

- c. *Pro se litigants are held to the same standards of conduct toward the tribunal and other parties as represented litigants.*

The movant argues that because she is not represented by an attorney she is not obligated to match the “higher standard” of conduct required of the respondents’ attorney. The movant confuses standards for pleadings filed with the tribunal with standards of conduct before the tribunal.

Pleadings are the written documents that are filed in an appeal, such as a notice of appeal, motions or briefs. The Supreme Court directs that *pleadings* from an unrepresented litigant “should be held to less stringent standards than those of lawyers”²² and their *briefs* should be read “generously.”²³ Nonetheless, the Supreme Court has also held that an unrepresented litigant is not excused from responsibility in the conduct of an appeal. For example, an unrepresented litigant who fails to file an appearance and answer may waive notice of entry of default;²⁴ who fails to raise an argument below, fails to preserve a point for appeal;²⁵ who fails to argue a point in briefs, waives the point on appeal;²⁶ or who fails to file a costs bill required by rule, waives costs on appeal.²⁷

²² *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987) (citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)).

²³ *Hymes v. Deramus*, 119 P.3d 963, 965 (Alaska 2005).

²⁴ *Brown v. Lange*, 21 P.3d 822 (Alaska 2001).

²⁵ *Price v. Eastham*, 128 P.3d 725 (Alaska 2006).

²⁶ *Pieper v. Musarra*, 956 P.2d 444, 446 (Alaska 1998); *A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995).

²⁷ *Fyffe v. Wright*, 93 P.3d 444 (Alaska 2004).

However, a lowering of standards for pleadings does not mean a lowering of standards for behavior; unrepresented litigants are held to the same standards of conduct as represented litigants are held to in their actions before the commission. Representation by an attorney has nothing to do with a citizen's obligations toward all tribunals charged by law with adjudicating citizens' disputes. The ethical duties of courtesy, candor, honesty, diligence, fairness and cooperation are owed not only to tribunals by counsel, but to, and by, the parties themselves.²⁸ The commission therefore rejects the argument advanced by the movant that she should be held to a lower standard of ethical conduct toward the commission, the board or the opposing party because she does not have an attorney. The lack of an attorney does not grant a party license to behave badly.

3. Conclusion and order.

The commission finds there is insufficient evidence of bad faith to warrant an award of attorney fees against movant under AS 23.30.008(d). The commission concludes that the movant's positions in her motion for extraordinary review, however mistaken and unpersuasive, were not frivolous or unreasonable as a matter of law. The commission rejects the movant's counter-argument that she should be held to a lower standard of conduct because she is not represented by an attorney.

Therefore, the commission DENIES the respondents' motion for an award of attorney fees and costs.

Date: May 11, 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David Richards, Appeals Commissioner

Signed

Stephen Hagedorn, Appeals Commissioner

Signed

²⁸ *Hartwell v. Marquez*, 201 W. Va. 433, 498 S.E.2d 1, 4 n.5 (1997).

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this motion for attorney fees and costs. The effect of this decision is to deny an award to the successful responding party in proceedings on a motion for extraordinary review filed by an injured worker. This decision does not affect proceedings before the board on Ms. Rockstad's claim or the parties' rights to raise similar issues in an appeal from a final decision of the board on her claim.

AS 23.30.129 provides that a party may file an appeal to the Supreme Court from a final decision of the Alaska Workers' Compensation Appeals Commission. This is a final decision on the motion for attorney fees and costs, although it is not a final commission decision on an appeal of a final board order on the underlying claim. An appeal must be instituted in the Supreme Court within 30 days of the date this decision is distributed. See the box below to find the date of distribution.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review or hearing within 10 days after the date of distribution of this decision. You may wish to consider consulting with legal counsel before filing a petition or an appeal.

If you wish to appeal (or petition for review or hearing) 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 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 commission within 30 days after delivery or mailing of this 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 appeal is not available, proceedings for other review under the Appellate Rules must be instituted within 10 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 40 days after the date this decision is mailed to the parties, whichever is earlier.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 108, Memorandum Decision on the Motion for Attorney Fees and Costs in *Linda Rockstad vs. Chugach Eareckson, Zurich American Insurance Co. and Novapro Risk Solutions*, Appeal No. 08-033, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission at Anchorage, Alaska, this 11th day of May, 2009.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that on 5-11-09 a copy of this Decision No. 108, the final decision on the Motion for Attorney Fees and Costs in AWCAC Appeal No. 08-033 was mailed to L. Rockstad (certified), M. Thoeni, & R. Bredesen at the addresses on record, and faxed to: R. Bredesen, AWCB Appeals Clerk, & Director WCD.

Signed
B. Ward, Deputy Appeals Commission Clerk