

Alaska Workers' Compensation Appeals Commission

Judith Lewis-Walunga and William J. Soule,
Appellants,

vs.

Municipality of Anchorage,
Appellee.

Final Decision

Decision No. 123 December 28, 2009

AWCAC Appeal No. 08-034

AWCB Decision No. 08-0200

AWCB Case No. 200403809

Appeal from Alaska Workers' Compensation Board Decision No. 08-0200, issued by the at-large panel on October 29, 2008, by Fred Brown, Chair, and Howard A. (Tony) Hansen, Member for Labor.¹

Proceedings: Appeal filed November 28, 2008. Substitution of appellants' counsel approved by order on January 27, 2009. Appellee's motion to extend time to file brief granted April 7, 2009. Appellants' motion for extension of time to file reply brief granted May 28, 2009. Appellants' second motion for extension of time to file reply brief granted June 5, 2009. Oral argument presented September 8, 2009.

Appearances: Michael Flanigan, Walther & Flanigan, for appellants William J. Soule and Judith Lewis-Walunga. Erin Egan, Russell, Wagg, Gabbert & Budzinski, for appellee Municipality of Anchorage.

Commissioners: David Richards, Stephen Hagedorn, Kristin Knudsen.

By: Kristin Knudsen, Chair.

William Soule sought an attorney fee award of \$38,920 for services on behalf of Judith Lewis-Walunga from December 14, 2006, through the date of the board's

¹ Member Hansen is appointed to the at-large panel, whose members may sit in any judicial district. AS 23.30.005(a). Mr. Brown was a hearing officer residing in Fairbanks, but hearing officers sit as the chair in place of the Commissioner of Labor and Workforce Development, who chairs all panels. No members of the southcentral panel sat on the hearing panel.

decision on her claim on June 30, 2008.² The board, which had decided Lewis-Walunga was entitled to an attorney fee, but that it did not have enough evidence to decide if the claimed fee was reasonable, directed the parties to try to settle the fee dispute.³ The parties failed to reach a settlement, and the board decided that Soule was entitled to payment of \$27,244 and legal costs.⁴ Soule appeals the fee award.⁵

Soule argues that the board could not reduce his fee because it found both his rate and his hours were reasonable. He argues the 30 percent reduction is an abuse of the board's discretion because the reduction is not supported by adequate explanation of the basis for the reduction, or substantial evidence. He also argues that the board erred by comparing the fee claimed to the amount of the board's award to his client. The Municipality argues that full, actual fees are not the equivalent of "reasonable" fees and that the board could reduce fees to reflect the claimant's success at hearing, including the amount of the award.

The parties' contentions require the commission to decide if the board made adequate findings of fact based on substantial evidence in the record to support a fee award of \$27,244. The commission holds that a fee may be reduced to reflect the difference between the value of the claimed benefits the employee was awarded and those benefits the employee sought but did not obtain. However, in this case the board failed to adequately explain the fee. The commission must decide if AS 23.30.145(b) contains a presumption that the claimed fee is "reasonable and fully compensatory." The commission holds that the presumption of compensability does not apply to a request for board approval of an attorney fee. For the reasons expressed in *Harnish*

² *Judith Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 08-0122 (June 30, 2008).

³ *Id.* at 61-63.

⁴ *Judith Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 08-0200, 21 (Oct. 29, 2008).

⁵ The appeal was filed on behalf of Judith Lewis-Walunga and her attorney, William J. Soule, but the opening brief was filed on behalf of Soule only.

Group, Inc., v. Moore,⁶ the commission remands this case to the board for further findings of fact.

1. *Factual background and board proceedings.*

William Soule represented Judith Lewis-Walunga over the course of her disputed workers' compensation claim against the Municipality of Anchorage, dating from a slip and fall in an icy parking lot as Lewis-Walunga was returning from a meeting March 31, 2004. Lewis-Walunga, who was then 59 years old, never returned to work after the fall. She retired on April 29, 2005.

The Municipality controverted Lewis-Walunga's claim in July 2004. There followed a prolonged effort to obtain temporary total disability (TTD) compensation, medical benefits for a knee, shoulder, neck, and "closed head" injury, vocational reemployment benefits, and permanent partial impairment (PPI) compensation. In December 2006, the Municipality withdrew its controversion of a shoulder and knee injury, and paid claimed TTD, PPI, and attorney fees of \$25,616.46 for services through December 13, 2006. This fee was approved by the board.

A number of subsidiary disputes were resolved, or claims and controversions withdrawn, as the parties proceeded to hearing, including Lewis-Walunga's objection to attending a neuropsychological examination, her request for a neurological second independent medical examination (SIME), TTD for certain periods, certain medical benefits, and her claim for cognitive deficits related to a brain injury. By the hearing on April 1, 2008, the only claims Lewis-Walunga asserted were for 5 weeks of TTD, additional PPI up to 33 percent, medical benefits, penalties on PPI previously paid, interest, and attorney fees and costs. Her chiropractor, Dr. Ross, also filed a claim for payment of services, which Lewis-Walunga supported. The board heard the case and decided Lewis-Walunga was entitled to 21 percent PPI, 5 weeks of TTD, interest, and some medical benefits. It denied Dr. Ross's claim and Lewis-Walunga's claim for

⁶ 160 P.3d 146 (Alaska 2007). *See also Harnish Group, Inc., v. Moore*, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (Dec. 24, 2008) (finding fee award not supported by substantial evidence and remanding to the board with instructions to take evidence to determine an attorney fee).

penalties. It found, however, it did not have the evidence to decide the claim for attorney fees. It gave the parties time to attempt settlement of that issue, and retained jurisdiction.

The attempt to resolve Soule's fee request failed. The request was heard on September 10, 2008. Soule represented the employee; Ms. Trena Heikes represented the employer. At the opening of the hearing, Ms. Heikes disclosed that she had accepted a position as Director of the Workers' Compensation Division, beginning December 1, 2009.⁷ The board awarded an attorney fee and full costs, but reduced the fee by 30 percent. Soule appeals.

2. *Standard of review.*

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.⁸ The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act (Act).⁹ If the commission must exercise its independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, it draws upon its specialized knowledge and collective experience and expertise in workers' compensation¹⁰ and adopts the "rule of law that is most persuasive in light of precedent, reason, and policy,"¹¹ to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.¹²

⁷ Hrg. Tr. 2:22 – 3:3. Mr. Soule withdrew as Lewis-Walunga's attorney six days after the hearing, when he began working as a workers' compensation hearing officer.

⁸ AS 23.30.128(b).

⁹ *Id.*

¹⁰ *See Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

¹¹ *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

¹² *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024 at 5, 2007 WL 80650 (Jan. 9, 2007).

3. Discussion.

a. The board failed to explain why it chose to award benefits under AS 23.30.145(b).

In its decision on Lewis-Walunga's claim, the board found that it had awarded Lewis-Walunga benefits.¹³ Citing *Wien Air Alaska v. Arant*,¹⁴ the board found the payment of the benefits claimed by the employee was resisted by the action of the employer.¹⁵ "Consequently," the board held, "we can award fees and costs under AS 23.30.145(b)."¹⁶ In the decision appealed here, the board quoted this statement,¹⁷ and, without further explanation as to why fees were awarded under AS 23.30.145(b) instead of AS 23.30.145(a), the board reaffirmed its finding that the employee's attorney was entitled to "reasonable fees" and costs.¹⁸ Although neither the appellant nor the appellee argues the board erred in awarding a fee based authority in AS 23.30.145(b), the commission determines that the board's failure to adequately explain its reasons for awarding fees solely under § .145(b) in this case is plain error.¹⁹

In *Harnish Group, Inc., v. Moore*, the Supreme Court reaffirmed a distinction between the authority to award fees under AS 23.30.145(a) and § .145(b).²⁰ The board has authority to award fees under AS 23.30.145(a) when an employer controverts a claim. A fee awarded under AS 23.30.145(a) may include a fee based on payment of future benefits. "In contrast," the Supreme Court has said, "subsection (b) requires an employer to pay reasonable attorney fees when the employer delays or 'otherwise

¹³ *Judith Lewis-Walunga*, Bd. Dec. No. 08-0122 at 62.

¹⁴ 592 P.2d 352 (Alaska 1979).

¹⁵ Bd. Dec. No. 08-0122 at 62.

¹⁶ *Id.*

¹⁷ Bd. Dec. No. 08-0200 at 19.

¹⁸ *Id.* at 20.

¹⁹ The commission will consider an issue that has not been raised when the issue "involves a question of law that is critical to a proper and just decision" or an error is "manifest on the face of the record." *Fred Meyer, Inc., v. Updike*, Alaska Workers' Comp. App. Comm'n Dec. No. 120, 7 (Oct. 29, 2009) (citations omitted).

²⁰ 160 P.3d at 152.

resists' payment of compensation and the employee's attorney successfully prosecutes the claim."²¹ In *Harnish Group*, the Supreme Court concluded the board erred in awarding fees under AS 23.30.145(a) because the employer had not controverted the benefits and the evidence was not sufficient to support a finding that the employer controverted in fact by actively resisting a claim after it was filed.²² On the other hand, the Supreme Court found that there was evidence in the record to support a finding the employer delayed or otherwise resisted payment, and therefore remanded to the board for an award of a reasonable fee under AS 23.30.145(b).²³

The Supreme Court distinguished controversion of a claim from conduct that is otherwise resisting or delaying payment:

In a workers' compensation case an employer can contest a claimant's entitlement to benefits in two ways. After a report of injury is filed, if an employer disputes its liability and refuses to pay benefits, it must file a notice of controversion. Whether or not it has filed a notice of controversion, an employer may also deny liability for benefits in its answer to a workers' compensation claim.

We have previously held that a formal notice of controversion is not necessary for an award of attorney's fees under AS 23.30.145(a). A controversion in fact is adequate to require payment of statutory minimum fees. . . .

* * *

We have never delineated the exact actions an employer must take to oppose a claim in order for there to be a controversion in fact. But we previously upheld the imposition of subsection .145(a) fees when an employer did not "unqualifiedly accept" the employee's claim for PTD compensation. Here, NC Machinery unqualifiedly accepted Moore's claim for PTD benefits in its answer to the claim, so it cannot have controverted in fact Moore's claim.

²¹ 160 P.3d at 151.

²² *Id.* at 152.

²³ *Id.* at 154.

* * *

Moreover, AS 23.30.145(a) provides, in part, "[w]hen the board advises that a *claim* has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded...." (emphasis added) . . . To determine whether there has been a controversion in fact in cases where an employer does not file a notice of controversion, the Board needs to look at the employer's answer to a claim for benefits and its actions after the claim is filed to determine whether the employer has controverted in fact the employee's claim for benefits.

* * *

. . . Because NC Machinery never actively opposed Moore's workers' compensation claim after he filed it, the Board erred in holding that NC Machinery controverted in fact Moore's claim.²⁴

The Supreme Court's holding is enlightening because it turns on whether the employer filed a controversion or controverted in fact after the claim was filed. Because it had not, the board could not award a fee under AS 23.30.145(a). Conduct that could be resistance of payment prior to the filing of a claim was not sufficient to establish controversion in fact of a claim. It follows that the act of controverting a claim, formally or in fact, is not equivalent to otherwise resisting payment.

The board's citation to *Wien Air Alaska v. Arant*²⁵ as justification for the decision to ignore the existence of a controversion is puzzling. In that case, the employer paid death benefits at a level rate and adopted the position that death benefits did not increase. The board, without mentioning controversion, awarded fees under AS 23.30.145(b) and Arant appealed the fee award. The employer argued that because it had never controverted benefits, although it had resisted increased payments, it could not be liable for continuing fees on future benefits under AS 23.30.145(a). The Supreme Court ruled that failure to file a formal controversion is not dispositive of the

²⁴ 160 P.3d at 151-152 (citations omitted).

²⁵ 592 P.2d 352 (Alaska 1979).

right to attorney fees under AS 23.30.145(a).²⁶ “AS 23.30.145(a) requires a finding by the board whether there has been a controversion in fact.”²⁷ The Supreme Court held that the employer’s conduct amounted to controversion, and remanded the case to the board for determination of an attorney fee under AS 23.30.145(a).²⁸

Arant stands for the proposition that a controversion of the increased benefit may be accomplished by consistent denial of liability and litigation of the disputed increase.²⁹ It does not support the proposition that the board may ignore the requirement that it make a finding in regard to controversion when awarding attorney fees, or that the existence of a controversion is irrelevant in awarding fees.³⁰ In this case, the board acknowledged that the employer contended that fees should be awarded under AS 23.30.145(a).³¹ The board’s decision reflects that it was aware the employer had filed formal notices of controversion and answered the claim. However, despite its review of the “procedural background,”³² there is no analysis of the record that explains why the board chose to award all fees as though no timely controversion had been filed (or no controversion in fact made in an answer) to Lewis-Walunga’s claim.

b. The board failed to make sufficient findings of fact to permit review its decision.

AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. A fee

²⁶ 592 P.2d at 365.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ The board’s citation of *Childs v. Copper Valley Elec. Ass’n*, 860 P.2d 1184 (Alaska 1993) is equally puzzling. In that case, the Supreme Court held that compensation that is controverted in fact and awarded is subject to a fee award under AS 23.30.145(a); but that a separate payment of compensation was delayed, and thus that payment was subject to a fee award under AS 23.30.145(b). *Childs* does not permit the indiscriminate bundling of all attorney fee awards into AS 23.30.145(b) on the basis that some claimed payments were delayed but not controverted.

³¹ *Judith Lewis-Walunga*, Bd. Dec. No. 08-0200 at 15.

³² *Id.* at 15-17.

award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the “nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.”³³ For this reason, the board’s regulations provide that a request for a fee exceeding the minimum fee under § .145(a) must be supported by the attorney’s affidavit, just as a request for a reasonable fee under § .145(b) requires an affidavit by the attorney.³⁴

³³ AS 23.30.145(a).

³⁴ 8 AAC 45.180 provides in pertinent part:

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; . . . If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

(c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. . . .

(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.

(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, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of

The board in this case found that the services performed were “complex, time consuming and costly for the employee’s attorney, . . .”³⁵ The board identified the total attorney fee billed as \$38,920. It then said,

[a]fter taking into account the nature, length, and complexity and benefits received in this case, we find the employee’s final attorney fees and cost billings are a little too high for granting an associated award. In part, because the total attorney fee award requested is substantially more than the compensation benefit amount awarded to the employee in the Board’s June 30, 2008 D&O, and we do not wish to speculate as to the value of any future benefits to the employee, we will reduce the attorney fee award from the total figures requested. Specifically, given the value of the benefits awarded the employee was approximately \$20,000, we direct the employer to pay 30% less than the full employee’s attorney fee award requested, or \$27,244.00 in attorney fees.³⁶

The difficulty presented by the board’s decision is illustrated by one finding. The board recited that it had considered the complexity of the services performed, and found them to be complex. However, complexity is not a simple state of being, as when a finder of fact finds a car is blue and not yellow. Some degree of complexity (in comparison to ordinary business activity) must be assumed by the nature of legal

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.

(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.

(e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney’s fees in advance in excess of the statutory minimum under AS 23.30.145.

³⁵ *Judith Lewis-Walunga*, Bd. Dec. No. 08-0200 at 20.

³⁶ *Id.* at 20-21.

practice; the board's finding that the services were "complex" does not explain to the commission the relative complexity of the legal services, or which services were more or less than usually complex. For example, the board states "multiple prehearing conferences were conducted and depositions were held,"³⁷ but, while a deposition of the employee or employer's medical examiner may be complex in comparison to ordinary business activity, depositions are within the ordinary routine of workers' compensation practice. The workers' compensation statutes provide that the testimony of a witness may be taken by deposition.³⁸ The fact that depositions were taken, standing alone, does not make a litigated case *unusually* complex.

AS 23.30.145(a) also requires the board to consider the benefits resulting from the services performed. Here the board compared the total value of the services performed to the value of the benefits awarded. Beyond noting that an award of the requested fee would be almost double the benefits awarded, the board did not determine if the services performed resulted in the benefit awarded. For example, those activities generated by the employee's objection to an SIME, because the objection was withdrawn by the employee, should not be included in the tally of "services performed" that resulted in the benefits awarded. Although the board noted the employer had objected to paying for those services, it made no finding whether the fee total included such services or the fee did not. The commission does not disapprove the comparison of values of benefits awarded to benefits sought as a means of establishing a percentage basis for calculating a fee; this practice was approved in *Williams v. Abood*.³⁹ But, the board did not make such a comparison here.

The board, not the commission, is the trier of fact in workers' compensation cases. Here, the record could support the board's decision to award a reasonable fee in excess of the statutory minimum under AS 23.30.145(a). However, what amount is a "reasonable fee" is for the board to determine – the commission's duty is to determine

³⁷ *Judith Lewis-Walunga*, Bd. Dec. No. 08-0200 at 20.

³⁸ AS 23.30.115(a).

³⁹ 53 P.3d 134, 147 (Alaska 2002).

if the fee awarded is an abuse of the board's discretion. An abuse of discretion will be found where the award is "manifestly unreasonable," but if the board's findings are inadequate to permit intelligent review of the board's decision, the commission must remand for further findings.⁴⁰ On reviewing the record, the commission cannot discern what the board found to justify the conclusion that the award is "a little too high." The commission must remand to the board for further explanation. This does not mean that the commission concluded that the evidence could not support the board's conclusion that \$38,920 was not a "reasonable fee." It means that the evidence in this case may support any number of findings, and the board, not the commission, is the body charged with the responsibility of making them.

c. There is no presumption of reasonableness of actual fees.

The appellant argued that his full, actual fee should be awarded because the board did not find either his hours or his fee rates unreasonable. Essentially, he argues that absent evidence that his hours or fee rates are excessive, his hours and fee rates must be presumed to be reasonable and therefore a fee based on those hours and rates is the only fee that is fully compensatory and reasonable.

First, the board did not make a finding that the appellant's hours were "reasonable" – it stated the amount of the fees and the fee rate, and it stated that the services were "time consuming and costly."⁴¹ The finding that the services were time consuming and costly does not mean the services were reasonable because the nature of the case justified the time consumed and attorney expenditures; it might as easily mean the board found the services were excessive and overpriced. Second, there is no presumption that an hourly rate or number of hours devoted to a service is reasonable.

⁴⁰ *Tire Distribution Center v. Chesser*, Alaska Workers Comp. App. Comm'n Dec. No. 090, 15, 2008 WL 4603564 *8 (Oct. 10, 2008); *Jones v. Frontier Flying Serv.*, Alaska Workers Comp. App. Comm'n Dec. No. 018, 17 n.95, 2006 WL 3325409 *6 n.95 (Sept. 7, 2006) ("[W]here a gap in the board's findings will not permit application of the law or intelligent review of the board's decision, we must remand the case to the board, because it is the board's responsibility to determine the facts.").

⁴¹ *Judith Lewis-Walunga*, Bd. Dec. No. 08-0200 at 20.

AS 23.30.145(a) permits an award of fees only on the amount of compensation controverted and awarded. The statute clearly requires the board to determine the reasonableness of each request for attorney fees in light of particular factors; because the law directs the board to make such findings before a fee is approved, there can be no presumption that a requested fee is “reasonable.” Therefore, the claimant bears the burden of producing evidence and persuading the board that the requested fee is reasonable.

The Supreme Court has held that a reasonable “attorney fee award is not necessarily limited to the hourly rate times the number of hours expended” and that other factors may be considered by the board.⁴² Fees exceeding the minimum fee awarded under AS 23.30.145(a), or those awarded under AS 23.30.145(b) must be fully compensatory for the benefits obtained, but they must also be *reasonable*.

The appellant argues that if full, requested fees are not awarded, even if they exceed the value of the benefit obtained, attorneys will not be available to represent injured workers with small claims. The commission recognizes that promoting the availability of counsel for injured workers is a legitimate legislative goal of the attorney fee statute. This goal is served in the current statute by provision of a statutory minimum fee that may result in disproportionate fees in some cases, a mandate to examine the complexity of services provided, and a barring of most fee awards against injured workers when the employer prevails. Thus, a small value claim that involves a novel application of the law or an injured worker’s claim that succeeds against heavy opposition, may result in fee awards that recognize the particular complexity or difficulty of the case.⁴³ Therefore, the commission rejects the “slippery slope” argument advanced by the appellant that if the board awards less than full requested fees in claims with small benefit awards, no attorneys will take cases with potentially

⁴² *Bailey v. Litwin Corp.*, 780 P.2d 1007, 1011 (Alaska 1989).

⁴³ A recognition of the difficulty of prevailing against “the odds” is a recognition of the greater weight given to the contingency factor in a particular case.

low benefit awards, leaving only those interested in *pro bono* work to represent injured workers.

The appellant's argument rests on another mistaken premise - that every such case requires aggressive, even uneconomical, litigation without regard to the expenditure of public resources or the attorney's time. All litigation involves a balancing of the resources the case is likely to consume and the importance of the right, or value of the benefit, sought to be obtained. Most workers' compensation claims, large or small, do not require the litigation resources consumed by other civil actions in employment or labor law. The legislature's provision of attorney fees that is, as the Supreme Court said, "unique in its generosity to the claimants and their counsel,"⁴⁴ recognizes that a workers' compensation claim is the only opportunity an injured work has for damages for injury. However, as this case illustrates, it is not a workers' only opportunity for justice in the work-place. The litigation of workers' compensation claims should not be treated as wholly exempt from the balancing of expenditure and risk that face employee plaintiffs in other labor and employment law actions.

The possibility of an unrewarding attorney fee if the claim is unsuccessful is the only check on wasteful over-litigation of a claim in the Alaska Workers' Compensation Act. Unlike a plaintiff in a personal injury action, the injured worker is protected from the impact of improvident litigation. He may not be charged attorney fees without approval of the board, and, if he loses, he need not pay his employer's fees. The economic burden of wasteful litigation choices in the workers' compensation system is not borne by the injured worker if he is the party making the choices; it is borne by the public in the expense of an overburdened system, employers in higher defense costs and higher premiums, other injured workers whose claims are stalled in a system rendered inefficient, and by the attorney ethically compelled to proceed when his client persists in a doubtful claim. The worker's claim may not succeed, but if he loses, his claim is all he loses. When the employer or insurer makes litigation choices, the possibility of payment of the employee's attorney fees, in addition to their own, is a

⁴⁴ *Haile v. Pan Am. World Airways, Inc.*, 505 P.2d 838, 841 (Alaska 1973).

consequence that must be weighed in making a choice to continue to litigate.

The legislature chose to shield the worker from improvident pursuit of a claim; but it did not choose to shield his attorney. The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature.

4. Conclusion.

The commission concludes that the board failed to make necessary findings of fact regarding the controversions that were filed and if controversions in fact exist. The board failed to adequately explain why it chose to neglect awards of those fees that must be established under § .145(a). The board failed to determine if the fees were, or were not reasonable. The board failed to adequately explain why the fees requested were "a little too high" or what the board found that justified the 30 percent reduction of fees in this case. Therefore, the commission REVERSES the board's decision, VACATES the board's order, and REMANDS this case to the board for further proceedings in light of this decision.

Date: 28 Dec. 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



signed

David Richards, Appeals Commissioner

signed

Stephen T. Hagedorn, Appeals Commissioner

signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal from Alaska Workers' Compensation Board Decision No. 08-0200 awarding an attorney fee. The commission vacated the board's decision

and order awarding the attorney fee of \$27,244, and remanded the case back to the board with instructions to make further findings of fact and conclusions of law. The commission has not retained jurisdiction. **This is a final administrative decision.**

Proceedings to appeal a final commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box on the last page.

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 within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

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 (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 distribution or mailing of this decision.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 126 issued in the matter of *Lewis-Walunga and Soule v. Municipality of Anchorage*, AWCAC Appeal No. 08-034, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 28, 2009.

Date: 1/7/10



signed

B. Ward, Appeals Commission Clerk