

Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of
Transportation,
Appellant,

vs.

Nicholas T. Stowell,
Appellee

Memorandum Decision No. 124
Order on Motion for Stay
October 15, 2009

AWCAC Appeal No. 09-022
AWCB Decision No. 09-0137
AWC Case No. 200714842

Motion for Stay of Judgment pending appeal from Alaska Workers' Compensation Board Decision No. 09-0137 issued August 9, 2009, at Fairbanks, Alaska, by northern panel members William Walters, Chair and Debra G. Norum, Member for Industry.

Appearances: Daniel S. Sullivan, Attorney General, and Christopher A. Beltzer, Assistant Attorney General, for appellant State of Alaska, Department of Transportation. J. John Franich, Franich Law Office LLC, for appellant Nicholas T. Stowell.

Commission proceedings: Appeal filed August 14, 2009, with Motion for Stay of Judgment. Appellant's unopposed motion for extension of time to respond to motion for stay granted August 26, 2009. Opposition to motion for stay filed August 28, 2009. Hearing on motion for stay held September 3, 2009. Supplemental memoranda requested and filed September 11, 2009. Appellant's supplemental notice of authority filed September 16, 2009. Order on motion for stay issued October 15, 2009. Unopposed motion to dismiss appeal filed October 27, 2009. Order dismissing appeal issued October 30, 2009.

Commissioners: Philip E. Ulmer, David W. Richards, Kristin Knudsen.

Appellant State of Alaska requests a stay of the board's order that it pay attorney fees in the amount of \$8,735 to appellee's attorney on a claim that was limited to a request that the State be found to have issued a "frivolous and unfair" controversion

under AS 23.30.155(o)¹ and an award of attorney fees.² Although the State asserts that the board made "mistakes in fact regarding the nature of the employee's condition, his treatment history, and the actions of the employer,"³ the State does not appeal the board's decision on the merits of the claim for a finding that the controversy was frivolous and unfair. The State appeals the board's order to pay the attorney fee because, *inter alia*, the board doubled the attorney's requested fee. Appellee Stowell argues that a stay should not be granted because appellant failed to address whether Stowell is insolvent or financially irresponsible, failed to demonstrate the probability of success on the merits, and failed to demonstrate a serious legal issue.

The commission, at the close of the hearing, requested the parties to present supplemental authorities on the issue of the ability of the commission to require a supersedeas bond from the State of Alaska. The parties were given opportunity to file supplemental authorities. Stowell filed a statement that he was "unaware of any additional authority on the issue."⁴ In addition to a memorandum, on September 16, 2009, the State filed a Notice of Supplemental Authority citing AS 09.68.040 and appended a copy of a territorial statute (Alaska Compiled Laws Ann. § 55-11-6 (1949)) exempting the territory of Alaska from any requirement to post bonds in any court proceeding. The record was deemed closed September 16, 2009.

¹ AS 23.30.155(o) provides

The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

² *Nicholas T. Stowell v. State of Alaska, D.O.T., Alaska Workers' Comp. Bd.* Dec. No. 09-0137, 1 (Aug. 5, 2009).

³ Statement Of Grounds Upon Which Appeal Is Taken, ¶ 13.

⁴ Appellee's Mem. Regarding Supersedeas Bond, 1 (Sept. 11, 2009).

1. Factual background and board proceedings.

This statement of facts is based on the material provided by the appellant and appellee and the board's decision. It is provided solely to put the present motion in context.

Nicholas Stowell is an expeditor who injured his back lifting a trailer ramp a little more than two years ago. He received three epidural steroid injections, and by April 28, 2008, he reported to his physician that he was working full time, mostly symptom free. He attended an employer medical examination two days later. The State's employer medical examiner, Dr. Schroeder, reported Stowell had a six percent permanent partial impairment, had reached medical stability, and further formal treatment was not indicated "unless the claimant has an additional flare-up causing increased or severe sciatic pain or if he has any kind of neurologic deficit."⁵ Based on this report, the State's workers' compensation adjuster controverted Stowell's entitlement to future medical benefits. The State's adjuster paid the permanent partial impairment compensation due.

Stowell, through his attorney, filed a workers' compensation claim dated July 28, 2008. Stowell saw a different physician, Dr. Witham, on July 30, 2008. Dr. Witham reported Stowell did not then need active treatment, although he also opined that if his symptoms returned, he would recommend physical therapy and epidural steroids before considering surgery. Stowell submitted the bill for Dr. Witham's services to the State's adjuster, and the bill was paid. However, the State denied Stowell's claims in an answer dated August 15, 2008. Later, in December, the State formally withdrew the controversy.

According to the State's attorney, he contacted Stowell's attorney on August 15, 2008, after receiving Stowell's claim, but Stowell's attorney neither returned his phone call, nor responded to a letter the State's attorney sent in September 2008. He heard

⁵ Mem. in Support of Mot. for Stay, Ex. 2, 9.

nothing from Stowell's attorney until an affidavit of readiness for hearing⁶ was filed January 29, 2009.

The board heard the claim on June 18, 2009, but left the record open until July 16, 2009, to receive an amended attorney fee affidavit and response. The issues for hearing were Stowell's claim that the 6-month controversion of future medical benefits was frivolous and unfair and his claim for attorney fees.⁷ He filed two affidavits of counsel, the second limited to the "time expended on the specific disputes of this hearing, itemizing \$4,217.50 in attorney fees and \$150.00 in paralegal costs."⁸ The board noted that the State "objected to *any* fees being awarded."⁹

The board found that the June 2008 controversion was "a denial of the continuing presumption of compensability for work-related treatment" notwithstanding that the employer had paid for some medical treatment after the controversion was issued.¹⁰ The board concluded the controversion was invalid and "[a]ccordingly . . . frivolous and unfair."¹¹ The board then considered the issue of attorney fees. It found Stowell "prevailed in his claim for a finding of frivolous and unfair controversion" and thus the board could award fees.¹²

The board found that Stowell's attorney provided 13.6 hours of valuable services at an hourly rate of \$300 to \$325, which the board found was reasonable.¹³ It found the attorney "worked to secure the employee's fundamental entitlement to medical benefits" and that it would apply a multiplier to the attorney fee award.¹⁴ It doubled

⁶ 8 AAC 45.070(b).

⁷ *Nicholas T. Stowell*, Bd. Dec. No. 09-0137 at 1.

⁸ *Id.* at 12.

⁹ *Id.* (emphasis added).

¹⁰ *Id.* at 8.

¹¹ *Id.* at 9.

¹² *Id.* at 10.

¹³ *Id.* at 5, 12.

¹⁴ *Id.* at 12.

the attorney fee award "to insure continuing motivation to represent the injured."¹⁵ The board ordered the State to pay Stowell a total of \$8,735 in attorney fees and paralegal assistant costs.¹⁶

2. Discussion.

a. Commission authority to stay the board's order.

AS 23.30.125(c) permits the commission to stay enforcement of a compensation order pending the commission's final decision on appeal.¹⁷ The commission may grant a stay of payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage"¹⁸ and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful, as to make them a fair

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AS 23.30.125(c) provides:

If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment, in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

¹⁸ AS 23.30.125(c).

ground for litigation and thus for more deliberate investigation.¹⁹ Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable damage and “the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments.”²⁰ The commission may take evidence and make findings of fact on motions for stay.²¹

b. Finding of irreparable harm.

When an appeal has been taken, the commission may grant a stay of board orders to pay lump sums upon a showing that the appellant faces irreparable harm if the appellant obeys the board’s order, but succeeds on appeal. Against the appellant’s potential loss, the commission balances the possibility that the appellee will be a future recipient of compensation from which the appellant may recoup the compensation ordered,²² the seriousness and difficulty of the questions raised on appeal, and the hardships faced by the parties. The harm to the appellant is considered irreparable as a matter of law in workers’ compensation appeals when there is no prospect that the sum paid by the appellant pursuant to board order may be recovered from future compensation paid to the employee.²³

¹⁹ *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska 1992) (quoting *A.J. Indus., Inc., v. Alaska Pub. Serv. Comm’n*, 470 P.2d 537, 541 (Alaska 1970) (footnotes omitted), modified in other respects, 483 P.2d 198 (Alaska 1971)).

²⁰ AS 23.30.125(c).

²¹ AS 23.30.128(c).

²² The Supreme Court, in *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064 (Alaska 1991), interpreted AS 23.30.155(j) so as to make overpayments of benefits and compensation (including payments to the employee’s attorney) not recoverable except through deduction from future payments of compensation, if owed. *Id.* at 1067.

²³ *Id.* at 1066-67. The Supreme Court did not expressly decide that an employee must repay funds his attorney received in *Croft*, although that conclusion may be implied. In *Croft*, the employer, who had prevailed on appeal, sought reimbursement from the employee’s attorney of the fee paid pursuant to the reversed board award. The Supreme Court held that AS 23.30.155(j) is the only means an employer has to obtain reimbursements of overpayments of compensation paid pursuant to a board order. The Court held that attorney fees awarded by the board are “compensation;” therefore, there was no other way to secure reimbursement of an

Stowell's attorney failed to address the Supreme Court's holding in *Croft v. Pan Alaska Trucking, Inc.* He did not present a mechanism by which, if the State is limited to an off-set against future compensation payments to secure repayment of an attorney fee award overturned on appeal, the State would be repaid the attorney fee once paid to Stowell's attorney.

The board's decision states that Stowell's benefits were controverted April 28, 2009, and that "disputes have developed."²⁴ The board's decision evinces no concern for the employee's potential liability for a "multiplied" attorney fee award if the award is overturned on appeal, indicating the board believed the award could never be recovered. The State denies an obligation for ongoing payments of workers' compensation benefits. We find that there is no undisputed liability for future compensation benefits from which the State may recover the attorney fee award if it is reversed on appeal. The commission need not decide if an employee may be required to repay a lump sum of attorney fees from future compensation here because Stowell's counsel did not admit the sum could be repaid from future compensation.²⁵ If an employee could be required to repay an attorney fee award on reversal of the board's award under *Croft v. Pan Alaska Trucking, Inc.*, there is still a distinction between requiring an employee to repay the cost of attorney fee representation in his

attorney fee award once paid to the employee's attorney, if the award is reversed on appeal. The Supreme Court had reversed the board's decision in Mr. Croft's client's favor and held the board erred as a matter of law in failing to apply the AS 23.30.110(c) time-bar to dismiss the claim. *Pan Alaska Trucking, Inc., v. Crouch*, 773 P.2d 947 (Alaska 1989). Thus, there was no need to decide if Mr. Crouch must repay the attorney fees paid to Mr. Croft, because, once the claim was time-barred, there was no possibility of future compensation payments anyway.

²⁴ *Nicholas T. Stowell*, Bd. Dec. No. 09-0137 at 4.

²⁵ Stowell argued that the State failed to show that Stowell was financially irresponsible because it produced no evidence of his insolvency. However, once the appellant establishes that the lump sum is a payment that may, as a matter of law, only be recovered from the employee's future compensation payments, and that there is no undisputed liability for future compensation payments, then the appellant has satisfied his burden of making a *prima facie* case. Appellee failed to produce evidence to the contrary.

unsuccessful case and requiring an unsuccessful employee to repay the cost of motivating attorneys to be available to represent the injured generally. On this point, the commission finds that the employee stands to suffer greater hardship if a stay is *denied* but the employer succeeds on appeal and no hardship, to the employee, if the stay is granted.

The hardship to Stowell's attorney caused by a delay in payment occasioned by a stay, if the State is not successful on appeal, is compensated by accumulation of interest. However, because the lump sum might not be repaid from future compensation, either because future compensation might not be payable or because the employee might not be liable for the repayment, the balance of hardships tips in favor of the State.

c. Doubling the \$300 to \$325 per hour fee to motivate attorneys to represent the injured raises serious and substantial questions.

The board found that Stowell's attorney's hourly fee of \$300 to \$325 was in the range of "experienced claimant's attorneys" and the 13.6 hours of work he claimed was expended on the controversion issue were reasonable. Therefore, the fee was adequate to compensate the attorney for the work he did. The board thus found an award of a fee of \$4,217.50 and costs of \$150 was sufficient to compensate the employee's counsel for successfully prosecuting a claim for no compensation or specific medical treatment, but a brief period of intangible right.²⁶

The question raised by the State is whether the board, having found the claimed fees adequately compensated the employee's attorney, may double the fee in order to provide "continuing motivation to represent the injured."²⁷ The board reasoned that medical benefit only cases are not lucrative and require special treatment. The State's appeal questions whether the board's stated rationale (medical benefit only cases are

²⁶ The board made no finding that Stowell was actually denied medical care or reimbursement for treatment of his injury during the six-month controversion period, or that he failed to seek it because of the controversion. The board decision states that a new controversion was issued April 28, 2009. Bd. Dec. No. 09-0137 at 4.

²⁷ Bd. Dec. No. 09-0137 at 12.

not lucrative as a class) justifies an award of a "motivational multiplier" if there was no claim for medical benefits and the only claim at issue is a claim that the controversy was unfair based on the possibility of need for future treatment. The commission finds this represents a serious and substantial question that requires further deliberation.

Moreover, the board's action in this case raises the question whether the board may award a multiplier based on a "private attorney general" theory, rather than a concern for vindication of Stowell's rights. While the State acknowledges that the Supreme Court has manifested a concern to assure the availability of counsel to represent injured workers, who may not, as a matter of law, be compelled to pay their attorneys for their services without board approval, the State challenges the board's interpretation of *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971 (Alaska 1986), and the line of cases thereafter, to *require* consideration of a contingency factor in awarding fees, even when an award of fees under AS 23.30.145(b), supported by the attorney fee affidavit, is fully compensatory and reasonable.²⁸ The commission finds that the use of *Bignell* to reward successful claims that closely resemble "private attorney general" actions is a serious and substantial question.

The State also asserts that the board failed to give notice to the parties that it would take judicial notice of facts relating to the status of some claims as more lucrative than others and other "facts" the board stated in describing its understanding of the economics of the practice of workers' compensation law. The State also challenges the substantiality of the evidence to support such facts. The commission observes that the board may not have intended to take judicial notice of a fact;²⁹ it may

²⁸ For example, in *State, Dep't of Rev. v. Cowgill*, 115 P.3d 522 (Alaska 2005), the Supreme Court explained that, when awarding hourly fees under AS 23.30.145(b), the objective of "fully compensatory and reasonable fees" was not to "be equated with placing employees' attorneys on an 'even footing' with the employers' attorneys defending the claims." *Id.* at 524.

²⁹ Alaska Rule of Evidence 201 provides:

Judicial Notice of Fact. (a) Scope of Rule. This rule governs only judicial notice of facts. Judicial notice of a fact as used in this rule means a court's on-the-record declaration of the existence

have stated its reasons for a policy it was about to act upon. However, the State's challenge is based on the assertion that the board's reasoning was based on facts which are *not* "generally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." If so, the State asserts, the board was required to declare on the record that it accepted the existence of those facts, but failed to do so before deciding to double the attorney fee. The commission finds this is a serious question requiring further deliberation. Therefore, the commission concludes that, at least so far as the doubled fee, the State has made a sufficient showing to support a stay of payment of one-half the fee awarded by the board.

- d. The appellant waived argument that the charges incorporated in the base attorney fee award were excessive or unreasonable.*

In oral argument, the commission inquired about the State's challenges at the board level to the specific charges listed in the attorney fee affidavit. The statement of grounds on appeal reflects a focus on the board's decision to double the fee. The State did not establish that the State had challenged specific charges as excessive or unnecessary in the memorandum in support of the motion for stay, nor was the commission persuaded in oral argument that the State argued against specific charges

of a fact normally decided by the trier of fact, without requiring proof of that fact.

(b) General Rule. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice as specified in subdivision (b), whether requested or not.

(d) When Mandatory. Upon request of a party, the court shall take judicial notice of each matter specified in subdivision (b) if the requesting party furnishes sufficient information and has given each party notice adequate to enable the party to meet the request.

in Stowell's attorney's second fee affidavit. Reviewing the points on appeal, the commission finds that the board's decision to award a fee is challenged in broad terms. However, the commission does not find that the State raised such serious and substantial questions regarding the board's determination that \$4217.50 represented a reasonable fee for the services performed.³⁰ The commission finds that the State's showing of serious and substantial questions is insufficient to support a stay of the base attorney fee award.

e. The state is not required to post a bond.

AS 09.68.040³¹ bars any court in the State of Alaska from requiring the state to post a supersedeas bond in a civil action. The State argues, with justification, that this

³⁰ The State failed to submit evidence of attorney charges, such as the affidavits of counsel filed with the board, with its motion. The only evidence submitted by the State concerning the attorney fee is an affidavit that Stowell's counsel did not return the assistant attorney general's telephone call or letter. While that affidavit may tend to prove Stowell's counsel did not do something, it does not tend to prove what he did do. Unless the affidavit established a conflict in the evidence the board failed to resolve, the affidavit does not raise a serious and substantial question regarding the substantiality of the evidence to support the board's findings on the base attorney fee.

³¹ AS 09.68.040 provides

Parties exempt from giving bond. (a) In an action or proceeding in a court in which the state or a municipality is a party or in which the state or a municipality is interested, a bond or undertaking is not required of the state, a municipality, or an officer of the state or municipality.

(b) A bond for costs on appeal need not be filed by a party to an action if a court finds that party to be indigent and the appeal not frivolous; this finding may be made upon an affidavit filed by that party showing that the party is unable to pay for a bond and further stating the grounds for the appeal and the belief that the party is entitled to redress.

(c) A court in this state may not excuse a litigant requesting the entry of a stay or other interlocutory relief from posting a bond or other security to protect the persons who will be adversely affected if the excuse is based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity

has been the rule since 1949, when Alaska was still a territory. The commission is not a court, but a quasi-judicial executive branch agency.³² The commission's authority is more restricted than the court's authority.³³ The legislature has exempted the State of Alaska from the court's authority to require a bond; what the legislature has stated the courts cannot compel, the commission will not require without a grant of authority from the legislature. There is no evidence that the State of Alaska may be unable to pay the stayed amount and interest. Therefore, the commission will not require a supersedeas bond of the appellant State of Alaska.

3. Conclusion and order.

The commission finds that the State faces irreparable harm if it pays the doubled attorney fee award and wins its appeal because it's ability to recover the fees from Stowell, if legally possible, is practically impossible where there is no liability for future benefits from which the overpayment may be reimbursed. The commission finds the State raises serious and substantial issues on appeal of the board's doubling of the base attorney fee in this case as a motivation to represent medical benefit only cases. Finally, the commission found that the State failed to demonstrate serious and substantial issues as to the base fee award. Based on these findings, the commission concludes the State is entitled to a partial stay of the board's award of an attorney fee.

Therefore, the commission ORDERS pursuant to AS 23.30.125(c) that Alaska Workers' Compensation Board Decision No. 09-0137, Order paragraph 2, awarding attorney fees and legal costs of \$8,735.00 is stayed *nunc pro tunc*, provided that \$4,217.50 of the award is not stayed. Because a timely motion for stay was filed by the

could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

³² *Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 35 (Alaska 2007).

³³ *Id.* at 37.

State, the time to pay that part of the board's award that is not stayed, (\$4,217.50), is tolled through the date of this order.

Date: Oct. 15, 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



signed

David Richards, Appeals Commissioner

signed

Philip Ulmer, Appeals Commissioner

signed

Kristin Knudsen, Chair

Published by the Appeals Commission Clerk at the direction of the Chair in Order
Dismissing Appeal, issued Oct. 30, 2009, upon the unopposed motion of the appellant.

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 Order on Motion for Stay in the matter of *State, Dep't of Trans., v. Stowell*, AWCAC Appeal No. 09-022, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on October 15, 2009.

Date: 12/29/09



signed

B. Ward, Appeals Commission Clerk