

Case: *Kenneth C. Widmer vs. Municipality of Anchorage/AFD and NovaPro Risk Solutions*, Alaska Workers' Comp. App. Comm'n Dec. No. 165 (August 3, 2012)

Facts: Kenneth Widmer (Widmer) fractured his hip while working as a firefighter in April 2001. The only issue on appeal was whether the board properly concluded that the Municipality of Anchorage (MOA) did not owe a penalty for a failure to timely pay reemployment benefits from November 16, 2010, to February 11, 2011. On July 13, 2010, the Reemployment Benefits Administrator's (RBA) designee decided that Widmer was eligible for a reemployment benefits eligibility evaluation due to unusual and extenuating circumstances that excused his late request. The RBA designee's letter explained how the employer/insurer could seek review of the decision. On July 22, 2010, MOA filed a petition requesting board review of the designee's decision. A month later, MOA controverted the designee's decision. The triggering date for the potential penalty period started with the exhaustion of permanent partial impairment (PPI) benefits (had they been paid biweekly at Widmer's temporary total disability (TTD) rate, rather than in a lump sum). The potential penalty period ended when MOA commenced payment of reemployment benefits a few days after the board affirmed the RBA designee's determination.

The board concluded that MOA did not owe a penalty for two reasons. First, under AS 23.30.041(c) and 8 AAC 45.520, MOA had timely requested review of the RBA designee's decision. Second, contrary to Widmer's argument, MOA was not required to seek a stay of the RBA designee's decision. Thus, no compensation in the form of reemployment benefits was owed until the board issued its decision in February 2011 and therefore no reemployment benefits were paid late. Widmer appeals.

Applicable law: AS 23.30.041(k) provides in relevant part:

If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate[.]

AS 23.30.041(d) states that "either party may seek review of the [RBA's] decision by requesting a hearing under AS 23.30.110."

8 AAC 45.530(a) indicates that the RBA will give the parties written notice "how to request review by the board of the determination." To obtain review of the decision, 8 AAC 45.070(b)(1)(A) provides that a party must file a claim or petition.

Under AS 23.30.041(c), the RBA "determines [whether] the employee has an unusual and extenuating circumstance that prevent[ed] the employee from making a timely request[.]" 8 AAC 45.520(c), provides that "after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110."

AS 23.30.155(e) provides for a penalty when compensation is paid late without an award and (f) provides for a penalty when compensation is paid late under the terms of an award.

Issue: Did the board err in concluding no penalty was owed for late payment of reemployment benefits?

Holding/analysis: The commission affirmed the board. Widmer argued he was owed a penalty under AS 23.30.155(f) because the RBA's decision was an award of reemployment benefits. The commission rejected this argument.

First, the [RBA designee's] decision was conditional because it was subject to review pursuant to 8 AAC 45.520(c), as was requested here by [the Municipality]. On review, that decision might be reversed by the board, in which case, no compensation in the form of AS 23.30.041(k) reemployment benefits would be payable. Second, irrespective of any review of evaluation eligibility, following an evaluation, Widmer might be found ineligible for reemployment benefits. In that event, no reemployment benefits would be owed him under AS 23.30.041(k), thus no money allowance, *i.e.*, compensation, would be owed Widmer. If no compensation is owed him, there is no amount against which a penalty could be calculated and imposed. Dec. No. 165 at 14-15.

Widmer also argued that the delay in receiving reemployment benefits, while the board reviewed and ruled on the propriety of the RBA designee's evaluation eligibility decision, was contrary to the goal of expediting the reemployment process. But the commission concluded that his reliance on AS 23.30.041(d) for expedited hearings is misplaced because that subsection expressly applied to reemployment benefits eligibility, not evaluation eligibility.

Widmer argued MOA could not controvert the RBA decision. The commission concluded that the controversion had no effect, but MOA's request for review was nevertheless valid.

Finally, Widmer waived his argument that MOA needed to seek a stay to postpone owing reemployment benefits as of November 16, 2010, because he did not identify it in his points on appeal and did not adequately brief it, mentioning it in one sentence of his brief.