

Case: *Municipality of Anchorage and NovaPro Risk Solutions vs. Brad J. Hanson*, Alaska Workers' Comp. App. Comm'n Dec. No. 182 (June 12, 2013)

Facts: Brad Hanson (Hanson), a firefighter, injured his back removing and replacing hoses from a truck in May 2008. He had two back surgeries in October 2003 and May 2009. Hanson also had suffered a back injury in 1992 and had surgery but did not have a permanent partial impairment (PPI) rating done at that time. In August 2009, the Municipality of Anchorage (Municipality) controverted his entitlement to certain benefits. A variety of doctors calculated different ratings for PPI. The board used the American Medical Association *Guides to the Evaluation of Permanent Impairment (Guides)* 3rd Edition to rate Hanson's impairment attributable to the 1992 injury and surgery at a minimum of 8% whole-person PPI. The board used the *Guides* 6th Edition to rate the 2008 injury and surgeries. Because of the extent of Hanson's preexisting lumbar impairment, the board found no additional lumbar impairment as a result of the 2008 injury. However the board awarded PPI based on a 3% rating for his sexual dysfunction (a complication of the 2009 back surgery).

The board concluded that Hanson was entitled to temporary total disability (TTD) benefits for attending an employer medical evaluation (EME) on April 18, 2009 and a second independent medical evaluation (SIME) on February 5, 2010. Hanson was determined to be medically stable on February 5, 2010. Hanson worked and was paid for a full day of work the day of the EME and he attended the SIME on a regularly scheduled day off. The board awarded Hanson's attorney fees under AS 23.30.145(b).

The Municipality appeals the board's attorney fee award and the TTD award for the two days when Hanson attended claim-related medical evaluations. Hanson cross-appealed the board's PPI rating.

Applicable law: AS 23.30.190(b) requires the board to determine PPI ratings for compensable injuries using the *Guides*, and subsection .190(c) requires it to reduce ratings by any preexisting impairment.

AS 23.30.185 provides in relevant part that TTD benefits "shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability."

The board has authority to award fees under AS 23.30.145(a) when an employer controverts a claim. AS 23.30.145(b) provides for attorney fees when "an employer . . . otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim."

Issues: Did the board properly calculate the PPI rating? Could the board award TTD for Hanson's attendance at an EME and an SIME? Did the board make adequate findings to support its award of attorney fees?

Holding/analysis: The commission reversed and remanded the board's PPI award. The commission concluded that the board erred in rating Hanson's 1992 injury because of insufficient evidence on which to base the rating. There were no contemporaneous medical records and some of the medical experts involved in evaluating Hanson stated

that the 1992 injury could not be rated absent such records. In addition, there were no range of motion measurements and no known neurological deficits on which to base a rating. In addition, the board erred in using different editions of the *Guides*, the 3rd edition to rate the 1992 injury and the 6th edition to rate the 2008 injury because of the markedly different methodologies between those editions. The *Guides* 6th Edition provided that "If different editions of the *Guides* have been used, the physician must assess their similarity. If the basis of the ratings is similar, a subtraction is appropriate. If the bases of the ratings differ markedly, the physician should evaluate the circumstances and determine whether conversion to the earlier or latest edition of the *Guides* for both ratings is possible." On remand, the commission ordered the board to consider whether the 1992 injury could be rated at all, whether both injuries could be rated using the same *Guides* and apportion impairment between the injuries, if possible.

The commission reversed the board's award of TTD benefits for his attendance at two claims-related medical evaluations. Hanson did not qualify for TTD because those benefits are only payable for *total disability* related to employment. Hanson could not be totally disabled when he was working. In addition, permitting Hanson to collect TTD on those days would result in "an unjustifiable double recovery" because he "would receive both disability benefits and employment benefits in the form of pay or time off." Dec. No. 182 at 29.

Lastly, the commission reversed and remanded the board's attorney fee award. The board failed to make adequate findings that the Municipality otherwise resisted payment of compensation to support an award under AS 23.30.145(b). Because subsection .145(a) fees would apply since the Municipality controverted the claim, the board needed to make findings to justify its decision to use subsection .145(b).

Presumably, as examples of the Municipality's resistance to paying compensation . . . the board found that Hanson's medical and legal issues were complex and varied. In the commission's view, the fact that the issues were complex and varied is not necessarily indicative of *resistance* on the part of the Municipality to paying compensation. We think that a better example of its resistance to the payment of compensation might be the retention of Dr. Yodlowski to perform another EME in June 2010. . . . As it turned out, both MOA and the board relied heavily on Dr. Yodlowski's opinions, which were central to the board's resolution of the PPI issue. Because we question the basis for the board's finding that the Municipality resisted payment of compensation, a remand is in order so that the board can make specific, relevant findings to support an award of attorney fees under AS 23.30.145(b). *Id.* at 32.

The commission also observed that the board might need to revisit the fee award, depending on its disposition of the PPI rating issue.