

Alaska Workers' Compensation Appeals Commission

Victor Shehata,
Appellant,

vs.

Salvation Army and Northern
Adjusters,
Appellees.

Final Decision and Order

Decision No. 075 March 19, 2008

AWCAC Appeal No. 07-021

AWCB Decision No. 07-0088

AWCB Case No. 200323810

Final Decision and Order on Motion for Attorney Fees following Alaska Workers' Compensation Appeals Commission Decision No. 063, issued December 20, 2007, on appeal from Alaska Workers' Compensation Board Decision No. 07-0088 issued April 17, 2007, by the southcentral panel at Anchorage, Alaska, Darryl Jacquot, Chair, Patricia Vollendorf, Member for Labor, and Janet Waldron, Member for Management.

Appearances: Philip J. Eide, Eide, Gingras & Pate, P.C., for appellant Victor Shehata. Colby J. Smith, Griffin & Smith, for appellees Salvation Army and Northern Adjusters.

Commissioners: John Giuchici, Philip Ulmer, and Kristin Knudsen.

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

The commission's decision¹ contains three opinions. The commission majority, for differing reasons, grants the appellee's motion for attorney fees. Appeals Commissioner Philip Ulmer and Appeals Commissioner John Giuchici join in the result and order payment of Salvation Army's attorney fee of \$5,270.00 by the appellant. Chair Kristin Knudsen dissents. Originally issued as an Order on February 29, 2008, the commission decision is here published in full.

¹ The Order on Motion for Attorney Fees was issued prior to the expiration of Appeals Commissioner Giuchici's term; Appeals Commissioner Giuchici's opinion is unaltered in this decision. The order contained a summary of Appeals' Commissioner Ulmer's opinion, which is set forth more fully in this decision.

By: Appeals Commissioner Ulmer

This was an appeal taken by an employee against a board order directing reimbursement of compensation obtained through false representations and awarding attorney fees to the employer under AS 23.30.250(b). The appeals commission affirmed the board's order.² The Salvation Army moved for attorney fees against Shehata on the grounds that it had prevailed on appeal to the commission and that a fee award would make it whole and sanction Shehata's egregious conduct. Shehata argued that without a commission finding that his appeal was frivolous, unreasonable or in bad faith, the commission had no power to award fees against an injured worker under AS 23.30.008(d). I conclude that Shehata's appeal was frivolous or unreasonable in light of his admitted misrepresentations, the evidence that he purposely delayed and obstructed the employer's efforts to discover the extent of his liability below, and the lack of legal support for the position he argued on appeal. Moreover, I believe that the reasons for including a provision for attorney fees at the board level under AS 25.30.250(b) support awarding attorney fees at the commission level against a worker who fraudulently obtained benefits. Therefore, I join with Appeals Commissioner Giuchici in ordering Shehata to pay Salvation Army's reasonable attorney fees of \$5,270.00.

*Factual background and board proceedings.*³

Victor Shehata injured his left shoulder and upper arm on December 22, 2003, while working as a shelter operations manager for Salvation Army. While he was receiving temporary total disability compensation, he worked for Totem Rentals from September 12, 2005, to October 14, 2005. Twice in October, he told Salvation Army's insurance adjuster that he was not working. Unknown to Shehata, an investigator

² Shehata has appealed the commission's decision to the Alaska Supreme Court.

³ These facts are discussed in more detail in our decision, *Shehata v. Salvation Army*, Alaska Workers' Comp. App. Comm'n, Dec. No. 063, 1-5 (Dec. 20, 2007).

videotaped him during one of these conversations in which Shehata, who was standing outside Totem Rentals, denied he was working.⁴

In November, the Salvation Army filed a notice of controversion, stating that he had inappropriately received benefits from September 12, 2005 to October 15, 2005. Shehata opposed his deposition and did not attend a pre-hearing conference addressing his opposition to the employer's discovery requests.⁵ He removed his name from a family business before answering interrogatories on his business activities.⁶

At the board hearing, Shehata admitted working for Totem Rentals.⁷ The board found that Shehata "systematically attempted to mislead the employer concerning his ability to work from September 12, 2005 to October 15, 2005" and that he "aggressively hindered the employer's ability to investigate," thereby, increasing the employer's attorney fees.⁸ The board ordered Shehata to reimburse Salvation Army for the benefits received during that period "for fraudulently obtaining these benefits with false or misleading statements," and awarded attorney fees and costs to the Salvation Army under AS 23.30.250(b).⁹ Shehata appealed and we affirmed the board's decision and order.¹⁰

Discussion.

1. *Salvation Army's reasonable attorney fees may be awarded under AS 23.30.008(d) because Shehata's appeal was frivolous or unreasonable.*

AS 23.30.008(d) requires the commission to award fees to a successful party but limits its authority to award fees against an injured worker:

⁴ *Id.* at 3.

⁵ *Id.* at 3-4.

⁶ *Id.* at 12.

⁷ *Victor Shehata v. Salvation Army – Older Alaskans Program*, Alaska Workers' Comp. Bd. Dec. No. 07-0088, 3 (April 17, 2007) (D. Jacquot, Chair).

⁸ *Id.* at 6.

⁹ *Id.* at 6-7.

¹⁰ *Shehata*, Alaska Workers' Comp. App. Comm'n, Dec. No. 063 at 1.

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.

The commission agrees that Salvation Army was the successful party. Our decision on appeal affirmed the decision of the board directing Shehata to reimburse the compensation he obtained through misrepresentation and to make the employer whole by paying its attorney fees.¹¹ However, because I agree with Chair Knudsen that Shehata was "an injured worker," I must consider whether his appeal was frivolous, unreasonable or in bad faith.

In my view, this was an unreasonable and vexatious appeal. Shehata admits that he lied about whether he was working to the employer's insurance adjuster, a misrepresentation that enabled him to collect temporary total disability benefits. One of the times he stated that he was not working he was, in reality, standing outside his place of work on a break. In addition, there is evidence that Shehata purposely delayed and obstructed the employer's efforts to discover the extent of his liability below. He refused, delayed or minimally cooperated with discovery on the scope of his ability to work. He removed his name from a family business before answering interrogatories asking about his business activities, opposed his deposition and did not appear at a pre-hearing conference addressing his opposition to discovery.

Lastly, on appeal to the commission, he argued that (1) no fraud occurred because the insurance adjuster did not rely on his admittedly false statement and (2) the employer waived its right to recover the overpaid benefits because it could have withheld part of its continuing payments to Shehata under AS 23.30.155(j). These arguments are frivolous and unreasonable because they lack legal support. Unlike an

¹¹ *Id.*

action in tort for fraud, the Alaska Supreme Court's test under AS 23.30.250(b) does not require showing justifiable reliance:

The employer must show that: (1) the employee made statements or representations; (2) the statements were false or misleading; (3) the statements were made knowingly; and (4) the statements resulted in the employee obtaining benefits. As it comports with the language of AS 23.30.250(b), we adopt this test.¹²

Shehata's second argument also is wholly without merit. As we discussed in detail in our decision,¹³ using the withholding provision in AS 23.30.155(j) does not serve justice when the overpayments were caused by an employee's misrepresentations because the employer bears the costs of recovering the overpayment. These were the same arguments that the board heard and rejected.¹⁴ This appeal increased the employer's cost of recovering the benefits lost through Shehata's misrepresentation and delayed the employer's reimbursement. Therefore, I conclude that Shehata should pay Salvation Army's reasonable attorney fees on this appeal because the appeal was frivolous or unreasonable.¹⁵

2. Alaska Statute 23.30.250(b) supports awarding attorney fees to Salvation Army.

Strong policy considerations weigh against allowing those whom the board determines obtained benefits fraudulently to burden their employers with the cost of an appeal to the commission without facing the possibility of liability for the attorney fees.

¹² *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005).

¹³ *Shehata*, Alaska Workers' Comp. App. Comm'n, Dec. No. 063 at 11-12.

¹⁴ *Victor Shehata*, Alaska Workers' Comp. Bd. Dec. No. 07-0088 at 5.

¹⁵ *See Liberty Mutual Ins. Co. v. Taylor*, 590 S.W.2d 920, 922-23 (Tenn. 1979) (holding employer was entitled to attorney fees since employee's workers' compensation appeal was frivolous because "[t]he material issues raised by the appeal were issues of fact and there clearly was material evidence to support the trial judge's findings on those issues"). The Alaska Supreme Court cited *Taylor* when it adopted the requirement that a workers' compensation appeal be found to be frivolous, unreasonable or in bad faith before a superior court may award attorney fees against an injured worker. *Whaley v. Alaska Worker's Comp. Bd.*, 648 P.2d 955, 960 n. 8 (Alaska 1982).

Those reasons motivated the inclusion of a provision for recovery of an attorney fee at the board level under AS 23.30.250(b), which provides:

If the board, after a hearing, finds that a person has obtained compensation . . . by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter.

While I respect the opinion of Chair Knudsen, I have yet to be convinced that justice is served by her strict interpretation of the law. I believe the Legislature's exclusion of the commission from AS 23.30.250(b) was a mere oversight because the same policy considerations apply to board and commission appeals in cases of false statements to obtain benefits. Moreover, Chair Knudsen agrees that the AS 23.30.008(d) test does not apply to those who are not "injured workers"; in other words, those who knowingly misrepresent that they were hurt, or that they were employees of the employer, to obtain benefits. In my view, there is no substantive difference between these types of misrepresentations and the misrepresentations that Shehata made to obtain benefits. Consequently, I believe that the employer's attorney fees may be awarded at the commission level in either case to deter employees from making false misrepresentations to obtain benefits.

I conclude that Shehata's appeal to the commission was frivolous or unreasonable. I find, with Appeals Commissioner Giuchici, that the fees requested, and the time expended, by Salvation Army's attorney are reasonable. Therefore, I join with my fellow Appeals Commissioner Giuchici in ordering payment of the full fee.

Appeals Commissioner John Giuchici, concurring.¹⁶

AS 23.30.008(d) provides that

¹⁶ Appeals Commissioner Giuchici's opinion was issued February 29, 2008, prior to expiration of his term.

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.

The board below found that Shehata had made misrepresentations that he was disabled and not working when, in fact, he was working. It is my view that Shehata was not an "injured worker" at the time that he made the misrepresentations that were the basis of the board's decision below. Therefore, I would find that AS 23.30.008(d) does not bar an award of attorney fees against Shehata. I join Appeals Commissioner Ulmer in finding that Salvation Army was the successful party, the fees requested, and the time expended, are reasonable, and in ordering payment of the full fee of \$5,270.00.

Conclusion.

For the reasons set forth above, the commission GRANTS Salvation Army's motion for an attorney fee of \$5,270.00.

Date: March 19, 2008

Alaska Workers' Compensation Appeals Commission



Signed

Philip Ulmer, Appeals Commissioner

Unavailable for signature

John Giuchici, Appeals Commissioner

February 29, 2008

Kristin Knudsen, Chair, dissenting.

I agree with my fellow commissioners that Shehata's misrepresentations were made while he was working. However, the liability for those misrepresentations arose out of his status as an injured worker, and the board did not determine that Shehata was not an injured worker in his relationship with the employer, Salvation Army. There was no determination by the board that, for example, he was not an employee of the

employer or that he did not suffer an injury under AS 23.30. For these reasons, I disagree with the opinion of my respected colleague, Appeals Commissioner Giuchici.

Shehata does not argue that he is the successful party or that the success of his appeal cannot be ascertained. Our decision on appeal affirmed the decision of the board. I find, with my fellow commissioners, that the appellees are the successful party in the appeal before us. The fees requested are reasonable. If that were the end of our inquiry, I would join the commission majority in awarding fees to the successful party.

However, AS 23.30.008(d) limits the authority of the commission to award fees in an appeal against an “injured worker” to those instances when “worker’s position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.” This is the same language applied by the Supreme Court to Superior Court awards of fees under Alaska Appellate Rule 508(g) in *Crawford & Co. v. Vienna*¹⁷ following amendment of Appellate Rule 508 after *Whaley v. Alaska Worker’s Comp. Bd.*¹⁸ In *Whaley*, the Supreme Court held that it was an abuse of the court’s discretion to award fees on appeal against an injured worker unless the Superior Court made findings that the appeal “was frivolous, unreasonable, or brought in bad faith.”¹⁹

The *Whaley* decision was based largely on the policy considerations of the Alaska Workers’ Compensation Act:

To permit an appellate court to grant attorneys’ fees to prevailing party-defendants without consideration of the underlying purpose of the Alaska Workers’ Compensation Act, would severely undermine the effectiveness of the statute. The statute is designed to provide the most efficient, dignified, and certain means of determining benefits for workers sustaining work-connected injuries,²⁰ and is to be liberally construed in

¹⁷ 744 P.2d 1175 (Alaska 1987).

¹⁸ 648 P.2d 955 (Alaska 1982).

¹⁹ *Id.* at 960.

²⁰ *Searfus v. Northern Gas Co.*, 472 P.2d 966, 969 (Alaska 1970), citing *Gordon v. Burgess Construction Co.*, 425 P.2d 602, 605 (Alaska 1967).

favor of the employee.²¹ In particular, AS 23.30.145 is unique in its generosity to claimants and their counsel.²²

A routine grant of attorneys' fees to employer-defendants would undermine the purposes of the statute and severely limit a claimant's ability to seek appellate relief. Thus, as we did in *Wise Mechanical Contractors v. Bignell*,²³ we choose here to reconcile our rule-making authority with the "broad public policy considerations which shaped and are embodied in workmen's compensation legislation."²⁴ We therefore construe Appellate Rule 508(e) to require a finding by the appellate court granting attorneys' fees to an employer-defendant that a claimant's appeal was frivolous, unreasonable, or brought in bad faith.²⁵

Appellate Rule 508(g)²⁶ was adopted shortly afterward, and, in *Crawford & Co. v. Vienna*, the Supreme Court held it was error for the Superior Court to refuse to award

²¹ *Hood v. State, Workmen's Comp. Bd.*, 574 P.2d 811, 813-15 (Alaska 1978).

²² *Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 841 (Alaska 1973).

²³ 626 P.2d 1085, 1087 (Alaska 1981).

²⁴ *Id.*, citing *Johns v. State, Dept. of Highways*, 431 P.2d 148, 152 (Alaska 1967).

²⁵ 648 P.2d at 959-60 (citations in text converted to footnotes, footnote omitted).

²⁶ Alaska Appellate Rule 508(g) provides:

(1) *Workers' Compensation Appeals*. In an administrative appeal from the Alaska Workers' Compensation Board or in an appeal from a denial of a claim of benefits under the Employment Security Act, an award of costs or attorney's fees shall not be made against the claimant in either the supreme court or the superior court unless the court finds that the claimant's position was frivolous, unreasonable, or taken in bad faith.

(2) In an administrative appeal from the Alaska Workers' Compensation Board, full reasonable attorney's fees will be awarded to a successful claimant. Counsel for the claimant shall serve and file an affidavit of services rendered on appeal within 10 days from the date of notice of an opinion or an order under Rule 214. Objections to the affidavit of services may be filed

attorney fees to a successful appellee under Rule 508(g) when the appeal was frivolous, unreasonable or taken in bad faith.²⁷ The Court said of the class action suit against insurance adjusters that it was “frivolous and unreasonable.”²⁸ The adjusters were “neither an insurer nor an employer . . . the insurers and/or employers . . . are responsible for paying compensation, not adjusters.”²⁹ Without an allegation that the *adjusters* engaged in wrongful conduct, “there was no legal basis for the workers to bring suit against Crawford and Company.”³⁰ In short, I read “frivolous or unreasonable” as a narrower exception to the bar against awarding fees against injured workers than does my respected colleague, Appeals Commissioner Ulmer.

The Legislature’s intent is that the current statute is not to be construed “in favor of a party.”³¹ Therefore, I cannot say that AS 23.30.008(d) should be “liberally construed in favor of the employee” or, as in this case, the employer who was the victim of the employee’s misrepresentation. Yet, I cannot ignore the plain meaning of the statute, which proscribes awards of attorney fees by the commission against an “injured worker” unless the position taken by the appellant on appeal is frivolous or unreasonable, or the appeal was taken in bad faith.

There are sound reasons for such a policy, just as sound policy suggests that a frivolous or unreasonable appeal should result in liability for fees, even against injured workers. It assures the injured worker has at least one level of review of a board order against him or her, without the deterrent effect of a possible additional financial burden if he loses. It does not apply against those appellants who are determined by the board (in a proceeding to obtain reimbursement under AS 23.30.250(b)) or this commission to not be “injured workers;” that is, those who knowingly misrepresented

within 7 days of service of the affidavit. An individual justice shall determine the amount of fees to be awarded.

²⁷ 744 P.2d at 1178.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ AS 23.30.001(3).

that they were injured, or that they were employees of the employer, to obtain benefits. On the other hand, the appeal to the commission is faster, and so probably less expensive, for the successful employer-appellee than appeal to the Superior Court. There is provision for payment of fees in the event of a frivolous or unreasonable appeal or an appeal taken in bad faith. Any change in the balance struck between the rights of the parties to recover the cost of representation in an appeal of a board order for reimbursement under AS 23.30.250(b) is one that must be made by the Legislature – not this commission. If we are to be empowered to award fees under AS 23.30.250(b), the Legislature must act.

I find, after reviewing the arguments of the parties, that the points on appeal raised by Shehata were not so lacking in legal basis or factual support as to be frivolous. The appellant had a right to appeal a board order to the commission under AS 23.30.127. The appellant is correct that the position advocated concerned an area of the law where there are few decisions of the court. While we found the appellant's position was unpersuasive, I do not believe that an unpersuasive, or even imprudent, argument is necessarily unreasonable. I do not believe we have sufficient *evidence* that the appeal was taken in bad faith, e.g., solely for the purposes of delay or to vex or harass the employer or for advantage in another proceeding.³² I conclude that we may not award an attorney fee against Shehata under AS 23.30.008(d).

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the Salvation Army's motion for attorney fees. The substance of this decision was issued in the commission's Order on Motion for Attorney Fees on February 29, 2008. It ended all proceedings on the motion for attorney fees. In an earlier final decision, Decision No. 063, the appeals commission affirmed (approved) the board's decision that granted the Salvation Army's petition for a reimbursement order and attorney fees. The appeals commission's Decision No. 063 ended all administrative

³² We recently addressed the issue of bad faith in *Sourdough Express Inc. v. Barron*, Alaska Workers' Comp. App. Comm'n Dec. No. 069 (Feb. 7, 2008).

proceedings on the Salvation Army's petition. This decision does not affect any other pending claims or petitions in the employee's case at the Workers' Compensation Board.

If you wish to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed to you. The appeal must be brought by a party-in-interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. To see the date this decision is mailed or otherwise distributed, look at the clerk's Certificate in the box below.

If you wish to appeal this decision 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 BY THE APPEALS COMMISSION

A party may ask the appeals commission to reconsider this decision by filing a motion requesting reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 075, the final decision and order on the motion for attorney fees by Salvation Army in the matter of Victor Shehata v. Salvation Army and Northern Adjusters, Appeal No. 07-021, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 19th day of March, 2008.

Signed
L. Beard, Appeals Commission Clerk

<u>Certificate of Distribution</u>	
I certify that a copy of this Decision No. 075, the Final Decision and Order on Motion for Attorney Fees in AWCAC Appeal No. 07-021, was mailed on <u>3/19/08</u> to Eide & Smith at their addresses of record and faxed to Eide, Smith, Director WCD, & AWCB Appeals Clerk.	
<u>Signed</u>	<u>3/19/08</u>
L. Beard, Appeals Commission Clerk	Date