

Alaska Workers' Compensation Appeals Commission

Arsenia Morgan,
Appellant/Cross-appellee,

vs.

Alaska Regional Hospital and
Broadspire/Arctic Adjusters,
Appellees/Cross-appellants.

Memorandum Decision and Order

AWCAC Decision No. 013 June 15, 2006

AWCAC Appeal No. 05-005

AWCB Case Nos. 200120068M

200101819, 200010470, 20012077

Memorandum Decision and Order on Motion for Waiver of Transcript Costs on Appeal of Alaska Workers' Compensation Board Decision No. 05-0256 and No. 05-0304, Anchorage Panel, by Rosemary Foster, Chairman, and John A. Abshire, Board Member for Labor.

Appearances: Arsenia Morgan, appellant, *pro se*; Tasha M. Porcello, Law Office of Tasha M. Porcello, for appellees, Alaska Regional Hospital and Broadspire/Arctic Adjusters.

Commissioners: John Giuchici, Marc Stemp, Kristin Knudsen.

By Kristin Knudsen, Chair:

Arsenia Morgan asks the commission to waive the cost of a transcript of her two hearings before the Alaska Workers' Compensation Board on the grounds of indigence.¹ Alaska Regional Hospital, through counsel Tasha M. Porcello, defers to the commission's judgment. The commission denies the motion to fully waive the cost of providing a transcript, finding Morgan is not indigent, but allocates part of the cost among the parties and waives preparation of a transcript of one of the hearings.

¹ Morgan's motion for waiver of filing fee was late; it was not filed until January 26, 2006, and was not properly served on the appellee. Without expressly considering her motion to waive the filing fee, we permitted the appeal to go forward after a hearing on a motion to dismiss on other grounds. Because the commission failed to rule on the motion but expressly allowed the appeal to go forward, we waived the filing fee without deciding the motion. Morgan did not file a motion for a waiver of her transcript fee until May 8, 2006.

Morgan's claim to be indigent.

Morgan filed a financial statement affidavit that reflects that she worked at two companies. Her spouse works and also draws a military retirement. Her financial statement affidavit attachments reveal monthly payments for a mortgage, auto insurance, four-wheelers, snow machines, jewelry, and other consumer goods. Her home is worth at least \$219,000² and \$173,000 remains owing on the mortgage. She states she earned between \$12.00 and \$16.50 an hour as a "caregiver." She earned \$13,950 in the last year; her husband earned \$24,278 plus received \$13,042 in military retirement pay. In short, the family³ income exceeded \$4,200/month.

Morgan's chief claim to indigence is that she owes payment on two Alaska student loans, but that the substance of the loans was "wasted." She intended to get a four-year nursing degree, but she did not obtain the degree. She received sufficient education to obtain an L.P.N. license.⁴ She documented payments of \$96.91/month on student loans, but claims she owes \$525/month on these loans. In addition, she claims she pays \$635/month against debts for medical care that total \$16,637.

The commission adapts Baker factors to establish a test for indigence.

AS 23.30.127(d) provides that the commission "may require an appellant to pay the costs of the transcript of hearing and the preparation of record on appeal." AS

² Morgan and her spouse own a house in Eagle River. The public inquiry screen of the Municipality of Anchorage Property Appraisal shows the property was appraised at \$263,000, about 20% more than the amount claimed by Morgan. <http://propertytax.muni.org/propappraisal/public.html> (then insert address in field). The financial statement affidavit form warns affiants that the commission may seek verification of information provided.

³ Morgan did not list dependents on her financial statement affidavit, although she refers to her children. For the purposes of this motion, we assumed two minor children living at home, based on the food allowance in her affidavit.

⁴ The state's public on line occupational license data base shows that Morgan is a licensed practical nurse. A temporary license was issued February 1, 2006; a license #6084 was issued to her on May 3, 2006. <http://www.commerce.state.ak.us/occ/OccSearch/main.cfm> (then insert name in field).

23.30.128(c) provides that the commission may receive evidence on applications for “waiver of fees by indigent appellants.” The commission’s regulations at 8 AAC 57.090(d)(2) provide that the commission may, with or without a hearing, exempt a person from full or partial payment of the fee and costs for transcript of hearing, but at 8 AAC 57.090(e) that “any costs or fees awarded by the panel under this section to an indigent appellant as prevailing party shall accrue to the commission to the extent necessary to reimburse the commission for costs relating to the indigent’s appeal.”

Neither our regulations, nor the Alaska Workers’ Compensation Act, define who is “indigent” for the purpose of granting a waiver of fees.⁵ However, the Alaska Supreme Court recently considered the issue in administrative appeal contexts.⁶ The Court stated in *Varilek v. City of Houston*⁷ that access to the courts to litigate economic and property rights is an “important” right.⁸ In *Varilek*, the Matanuska-Susitna Borough issued an enforcement order against Varilek for failure to remedy violations of zoning and land use codes regarding disposal of junked cars. Varilek tried to file an appeal to the Borough Board of Adjustment, and requested a waiver of a \$200 filing fee because he was indigent. The Borough had no provision for waiving the fee, and his request

⁵ A definition of “indigent person” is found at AS 18.85.170(4), (relating to qualification for appointment of a public defender):

“indigent person” means a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party’s dependents of food, clothing, or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter.

⁶ *Varilek v. City of Houston*, 104 P.3d 849 (Alaska 2004); *Bustamante v. Alaska Workers’ Comp. Bd.*, 59 P.3d 270 (Alaska 2002); *Baker v. Univ. of Alaska*, 22 P.3d 440 (Alaska 2001).

⁷ 104 P.3d 849 (Alaska 2004).

⁸ *Id.*, at 854, citing *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988).

was denied. Varilek then brought a lawsuit against the Borough and City of Houston, claiming violation of his constitutional rights and that refusal to waive the fee meant he had effectively exhausted his administrative remedies or was excused from doing so. On the question of the Borough filing fee, the Court concluded that

[a]n indigent whose business or property interests are threatened by an administrative action originally filed by a government agency need not be litigating a fundamental family matter in order to have a right of access to the courthouse. Since “prohibitive” filing fees should not be allowed to hamper an indigent litigant’s access to the justice system in such situations, it follows that such fees should also not be allowed to hamper his access to an administrative process if such access is a prerequisite to judicial relief.⁹ (*citations omitted*).

We believe that the right to access the workers’ compensation administrative process that is a prerequisite to relief in the court system is also an important right, even if the process is not initiated by a government agency, and that “the size of a party’s back account’ should not ‘foreclose [that] party’s opportunity to be heard.’”¹⁰

In *Baker v. University of Alaska*¹¹ the Supreme Court used a “substantial hardship” test to relieve the appellant of *prepayment* of fees for preparation of the record and transcript under a rule that did not require a showing of indigence.¹² The Court noted that because the case concerned “relief from prepayment, not from the underlying obligation to pay the cost,” the criminal indigence standards relied on by the dissent “are of limited relevance.”¹³ Under the same Appellate Rule 604 applied in

⁹ *Varilek*, 104 P.3d at 855.

¹⁰ *Baker v. Univ. of Alaska*, 22 P.3d 440, 443 (Alaska 2001) *quoting Peter v. Progressive Corp.*, 986 P.2d 865, 872-873 (Alaska 1999), *quoting Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973).

¹¹ 22 P.3d 440, 442-443 (Alaska 2001).

¹² Alaska R. Appellate P. 604(b)(1)(B)(iv). The Court noted that under this Rule, “indigence is certainly sufficient for relief, it is not in all cases necessary.” 22 P. 3d 442.

¹³ 22 P.3d at 443 n.9.

Baker, the Supreme Court later directed the Superior Court to “consider the options” available to it when a workers’ compensation claimant-appellant requested relief from the requirement that he prepay the costs of preparation of the record.¹⁴

The *Baker* analysis is not fully compatible with the commission’s authority under AS 23.30.127(d) and 128(c). Where a statute provides, as it does in AS 23.30.128(c), for *waiver* of fees and transcript costs because the appellant is *indigent*, the court’s indigence standards are not completely lacking in relevance. A workers’ compensation claim is not a proceeding “initiated by the state” which threatens the livelihood or property of the appellant.¹⁵ There is no inquiry under the workers’ compensation system as to the parties’ respective fault; the concern is the existence of disability and its relationship to the employment. There is no showing here that the appellee “caused a substantial increase” in the cost of the transcript, but in such a case the commission’s regulations provide for allocation of “unnecessary costs” to the party causing them to be incurred.¹⁶ Attorney fees incurred at the board are not chargeable to an employee appellant in the absence of board approval.¹⁷ Finally, it is not possible for an employer to recover attorney fees in an appeal from an employee if the employer prevails, unless the appeal is frivolous.¹⁸ Therefore, because the *Baker* factors¹⁹ are helpful but not

¹⁴ *Bustamante v. Alaska Workers’ Comp. Bd.*, 59 P.3d 270, 273 (Alaska 2002).

¹⁵ *See, Varilek*, 104 P.3d at 854 (giving greater weight to the value of the private interest affected by government action because the government was the source of the threat to the private interest).

¹⁶ 8 AAC 57.120(g).

¹⁷ AS 23.30.145 and AS 23.30.260.

¹⁸ AS 23.30.008(d).

¹⁹ The court relied on a number of factors: (1), Baker was illegally terminated from his employment; (2), the University caused a substantial increase in Baker’s litigation expenses; (3), Baker’s case already cost him more in attorney fees (\$50,000) than he was paid in damages; (4), Baker incurred a debt that precluded his ability to secure loans to pay his expenses and his expenses “often exceeded his income;” and, (5), the University was in a position to protect itself in terms of

directly pertinent to a request for a AS 23.30.128(c) “waiver of fees by indigent appellants,” the commission requires a demonstration that the payment of the fees and costs would cause something more than financial hardship of the sort described in *Baker* for a waiver of fees by an indigent appellant instead of a waiver of prepayment.

In addition, we note that the workers’ compensation statutes and the commission’s regulations make substantial provision to reduce the cost of appeal. The state bears the cost of preparing a copy of the record on appeal for the commission, or transmits the original board record to the commission. The only cost to an appellant for preparing a record is the cost of a transcript of the hearing, if an oral hearing was held, and that cost may be recovered by successful litigants. The filing fee charged by the commission is only \$50.00,²⁰ half the amount allowed by law.²¹

When administrative appeals are taken to the superior court, the superior court may waive prepayment, require the appellant to narrow the designation of needed transcripts, or allow “designation of the use of tapes (with log notes) if the testimony being reviewed [is] not so lengthy as to cause an undue burden for the reviewing court.”²² Board transcripts are prepared by private transcribers, so the commission

recovering the costs in the event the University prevailed because Baker was a University employee. *Baker*, 22 P.3d at 443. Justice Matthews, dissenting, focused on Baker’s income, noting he had received a payment of \$48,000 in addition to his annual salary of \$50,000 from the University, and the advance notice of the cost (he had eighteen months to budget the payment of \$3,500 in record preparation costs). *Id.*, at 444. Baker’s nonpayment “seems to have resulted from choices he made that were not spurred by strict economic necessity”. *Id.* Because Baker’s annual financial resources “far exceeded” the “allowable household expenses” for indigents claiming court-appointed counsel under Alaska R. Crim. P. 39.1, and because Baker was pursuing a civil action “for his personal financial benefit,” Justice Matthews found it “hard to see why he should be entitled to a more relaxed standard of financial hardship than those accused of crime.” *Id.*, at 445. We also note that the fees in *Baker* and *Varilek* were substantially higher than those considered here.

²⁰ 8 AAC 57.070(a)(3).

²¹ AS 23.30.127(d).

²² *Bustamante*, 59 P.3d at 273, referring to options available under Alaska R. of Appellate P. 604(b).

does not have the power to waive prepayment to the transcribers. It does, however, have the power to allocate the costs of the transcript among parties, or to assume costs itself, which it may later charge against a party.²³ The commission encourages the narrow designation of needed transcripts.²⁴ While the commission can review digital recordings on CDs produced by the board, the board does not create log notes.²⁵ Lengthy recordings, or those recorded in obsolete formats, may present an undue burden for the commissioners.

However, we also believe that the criminal indigence standards are not appropriate in the workers' compensation context. A workers' compensation claim is not a case in which the state threatens the fundamental interests of the appellant; it is a "species of property, it is an interest that is much less important than the exercise of parental rights, the custody of children, or deprivation of liberty."²⁶ Nonetheless, a workers' compensation claim is a case in which the state, through the Alaska Workers' Compensation Act, structures and regulates a part of the private employment relationship between employee and employer²⁷ and the state provides, through the board and commission, the means of adjudicating the disputes that arise under the

²³ 8 AAC 57.120(e).

²⁴ 8 AAC 57.120(g).

²⁵ The Supreme Court was apparently unaware that the board does not create formal log notes to accompany hearing tapes when it urged the Superior Court to consider reviewing tapes "with log notes" as an alternative to transcripts in *Bustamante, supra*, at 273.

²⁶ *Bustamante*, 59 P.3d at 274, citing *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1378 (Alaska 1988).

²⁷ The Alaska Workers' Compensation Act "constitutes part of every contract of hire, express or implied, and every contract of hire shall be construed as an agreement on the part of the employer to pay and on the part of the employee to accept compensation in the manner provided in [the Act] for all personal injuries sustained." AS 23.30.020.

Act.²⁸ Also, workers' compensation benefits represent a means for injured workers to obtain medical care that may affect "the very quality of [their] future existence."²⁹

We recognize that appellants may, by reason of a disability, be unemployed or returning to work after a period of unemployment. They may have incurred substantial debts for medical care. Finally, a historical purpose of workers' compensation laws is the dignified prevention of impoverishment of workers, and their dependent families, whose injuries are a result of an industrial economy that benefits our society as a whole; it ill suits that purpose if we require appellants to make available for litigation of their claims all resources above the "allowable household expenses" approximately equal to the adjusted federal poverty guidelines for an appellant's household.³⁰

In order to determine whether an appellant is "indigent" for the purpose of granting a waiver of fees, we adapt the *Baker* factors to the purposes and circumstances of workers' compensation administrative appeals, keeping in mind our desire to avoid foreclosure of the opportunity for an appeal. We examine first whether the appellant is working, capable of working, or has other reliable income (such as on-going payment of compensation); second, whether the appellant has incurred substantial costs associated with the workers' compensation claim that are *not* subject to payment by the opposing party if the appellant prevails; third, the amount of medical treatment debt for which the appellant is directly and personally liable (i.e., that is not covered by other insurance, including Medicare or Medicaid); and fourth, the assets and resources available to the appellant after payment of ordinary household expenses and other unavoidable debts, as detailed in the financial statement affidavit filed by the appellant. In cases where waiver of the cost is not granted for indigence, we will

²⁸ AS 23.30.055. Also, unlike other private conflicts, workers' compensation claims may not be freely settled by the parties. Settlements must conform to a form prescribed by the director of the workers' compensation division, AS 23.30.012(a), or, if by minors, unrepresented employees, or incompetent claimants, or if medical benefits are waived, are effective only upon approval by the board. AS 23.30.012(b).

²⁹ *Bush v. Reid*, 516 P.2d 1215, 1218-19 (Alaska 1998).

³⁰ *Varilek*, 22 P.3d at 445.

consider other relief, such as allocation of the cost of the transcript among the parties, particularly cross-appellants, or reviewing recordings without a transcript.

Morgan is not indigent, but showed sufficient financial hardship to be partially relieved of the cost of a transcript.

Applying these factors in this case, we find Morgan is not indigent. Morgan works, earning, according to her affidavit, \$12 – \$16/hour as a “care-giver” in 2005; as a newly licensed L.P.N. she is capable of earning more.³¹ She and her spouse last year had a household income over \$4,200/month. Morgan represented herself before the board, and has no associated costs that are not capable of being reimbursed if she prevails. She does have substantial medical debt, and she states she pays \$635/month on her medical debt.³² The medical debt is part of her workers’ compensation claim, so

³¹ According to the Alaska Department of Labor and Workforce Development’s Division of Research and Analysis, the Occupational Employment Statistics (OES) semiannual survey, a federal-state cooperative program with the U.S. Bureau of Labor Statistics, in the Anchorage Mat-Su area, Licensed Practical Nurses and Licensed Vocational Nurses are paid an entry-level wage of \$17.51/hour and a mean wage of \$20.01/hour. <http://www.labor.state.ak.us/research/wage/anchoes.htm#healthp>

³² Financial Statement Affidavit Addendum at 1. Morgan claims she both concealed the amount of her debt from her spouse and promised her spouse that she would be able to pay it herself:

He is not aware of these medical bills that is drowning us. I have kept all the bills from him because he expected too much and this RN 4 degree that I was to complete before he retired. When I was being treated I kept telling him that I will pay for all of this bills as soon as I get better.

Financial Statement Affidavit, attached letter, at 1. Morgan’s statement is not a persuasive a reason for the commission to waive the transcript cost. If true, it suggests that a person willing to conceal a \$16,000 debt for medical treatment from a current spouse (who is not alleged to be abusive) may be willing to conceal other, more damaging, information from those entitled to know it, and so undermines the reliability of the information provided. Also if true, it suggests that the household resources are larger than she claims if she is able to pay \$635/month without her husband becoming aware of the lost income. Morgan’s claim to have concealed the debt from her husband is somewhat contradicted by her statement that “my husband thinks it is all my fault that we have no money, they were all spent to pay rehab & to buy groceries.” Morgan, Letter of Reconsideration and Reasons for Reconsideration at 4.

that if she prevails she will be relieved of that debt and reimbursed the payments she made.

Morgan's student loans are an unavoidable debt, incurred prior to the injuries that are the subject of this claim.³³ Although she claims she owes payments of \$525 monthly, the documents she filed reveal actual payments of less than \$100 monthly. Even allowing for the debt payment load created by a mortgage and medical treatment, the student loan payments are not so substantial that they render Morgan indigent. Given her household resources and earning capacity, she can assume responsibility for at least partial payment of the cost of a transcript.

Morgan's case involves over four hours of testimony in two hearings.³⁴ Morgan's case turns in part on her own testimony. In these circumstances, a transcript is important. Requiring the commissioners to listen to both recordings is likely to exceed the cost of the transcript.³⁵ The appellee filed a cross-appeal. Although Morgan is not so indigent as to warrant complete relief from fees, we find that payment of the full transcript cost is a financial hardship and that a cross-appeal was filed by Alaska Regional Hospital. Weighing the factors we described above, we divide the cost of the transcript of the May 24, 2005 hearing in half; one-half to be paid by Morgan, one-half to be paid by the cross-appellant. The state paid for the production of the documentary record, and the commission will waive a transcript of the September 7, 2005 hearing on the petition for reconsideration. Morgan will obtain a copy of the recording of the September 7, 2005, hearing from the board for the commission's use.

³³ Appellant states she was in her third year of the nursing program at the University of Alaska Anchorage when she was injured. Morgan, Letter of Reconsideration and Reasons for Reconsideration at 2.

³⁴ Reply to Order on Mot. to Waive Transcript of Hr'g at 1.

³⁵ The state must reimburse appeals commissioners \$400 per day, pro rata, for their services. AS 23.30.007(k).

Conclusion and Order.

Morgan's request for a complete waiver of transcript cost on the basis of indigence is denied. However, in view of the circumstances of financial hardship she demonstrated, we allocate payment of the transcript costs as follows: the cost of a transcript of the May 24, 2005 hearing will be paid by Morgan and Alaska Regional Hospital, in equal shares. The board appeals clerk is requested to arrange for the tape to be sent to a transcriber, with an explanation of the division of the cost. The transcript will be filed with the commission within 40 days of the date of this order. The commission waives a transcript of the September 7, 2005 hearing. Morgan will obtain a copy of the recording and file it with the commission.

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Dated: June 15, 2006

Signed

John Giuchici, Appeals Commissioner

Signed

Marc Stemp, Appeals Commissioner

Signed

Kristin Knudsen, Chair

I certify that on 6/15/2006 a copy of this Memorandum Decision and Order No. 013 was mailed to Morgan and Porcello and a copy was faxed to Porcello, AWCB Appeals Clerk, and Director WCD.

Signed

C.J. Paramore, Appeals Commission Clerk