

Alaska Workers' Compensation Appeals Commission

Doyon Drilling Inc. and Alaska National
Ins. Co.,
Appellants,

vs.

Randy A. Whitaker,
Appellee.

Final Decision
on Motion for Attorney Fees
Decision No. 008 April 14, 2006
AWCAC Appeal No. 05-008
AWCB Case No. 200207685

Final Decision on Motion for Attorney Fees following Final Decision on Motion to Dismiss Appeal from Alaska Workers' Compensation Board Order No. 05-330, Fairbanks Panel, by Fred G. Brown, Chairman, and Chris Johansen, Board Member for Management.

Appearances: Richard Wagg, Russell, Tesche, Wagg, Cooper & Gabbert, for appellants, Doyon Drilling Inc., and Alaska National Ins. Co.; Robert Beconovich for appellee, Randy A. Whitaker.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By Kristin Knudsen, Chair:

Following our final decision of March 7, 2006 in this case, the appellee sought an attorney fee award as the successful party. The appellant opposed on the grounds that the appellant was the successful party. For the following reasons, we award a partial attorney fee to the appellee.

In our final decision of March 7, 2006, we vacated the board's order of December 14, 2005, based on the absence of jurisdiction by the Alaska Workers' Compensation Board to issue an order directing payment of future controverted temporary benefits without considering the evidence and without first obtaining a

remand from the Superior Court to consider the evidence.¹ The employer argued that the board's order on the employee's claim was improper because it was made without considering the evidence and asked us to reverse the board. The employee argued that the commission had no jurisdiction because the underlying matter was on appeal to the Superior Court. Because the underlying matter was on appeal to the Superior Court, the board could not consider new evidence without a remand order from the court for that purpose; therefore, the board's award on the employee's claim was mere enforcement of its prior (appealed) order.

This was a case that presented a difficult issue that had not been presented before now to the commission. The commission is a new administrative appellate body. The efforts of the parties' attorneys contributed to the understanding of the extent of its jurisdiction. The commission is grateful to both attorneys for well-developed written presentations of their arguments on the question of jurisdiction. Neither party questioned the commission's authority to award attorney fees for the work before the commission. Ordinarily, in the event of remand for further proceedings, no award would be made until the conclusion of the case. However, in this instance, the commission has not retained jurisdiction, and, unless the court rules otherwise, this case will not appear before the commission again.² Our decision terminated all proceedings in the case before the commission.

AS 23.30.008(d) directs that the commission "shall award fully compensatory and reasonable attorney fees" to a successful party upon appeal. The public policy embodied in that phrase³ is not served by leaving work uncompensated in the unique circumstances of this case.

¹ *Doyon Drilling Inc. v. Whitaker*, AWCAC Decision No. 6 (March 7, 2006). AS 23.30.128(d) permits the commission to "issue other orders as appropriate."

² The parties could appeal to the commission from proceedings on a separate claim, not intertwined with the claim that was appealed to the superior court.

³ AS 23.30.008 (d) is modeled on Alaska Rule of Appellate Procedure 508(g)(2), of which the Supreme Court said in *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1193 (Alaska 1993):

We may award attorney fees to employers or other parties,⁴ but we cannot award attorney fees *against* an injured worker unless the workers' appeal is brought in bad faith, or in other circumstances not applicable here.⁵ Our first inquiry then is to determine who is the "successful party" in this litigation.⁶

Alaska Appellate Rule 508(g)(2) calls for an award of "full reasonable attorney's fees ... to a successful claimant" in an administrative appeal. In order to recover fees under AS 23.30.145(b), which like Rule 508(g) directs a fee award to a "successful" claimant, the employee must succeed on the claim itself, and not a collateral issue. *Adamson v. University of Alaska*, 819 P.2d 886, 895 (Alaska 1991). Childs lost on his main claim: his effort to win those disability and medical benefits that CVEA still controverted. Therefore, the superior court did not err in denying attorney's fees for the whole claim.

Thus, the fee awarded by the commission must reflect the success of the party. In addition to the fee being "reasonable," the commission's fee award must be "fully compensatory," reflecting the policy stated in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 975 (Alaska 1986), that in workers' compensation cases the objective is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers.

⁴ AS 23.30.008(d) directs awards to "a successful party" instead of "a successful claimant."

⁵ If an injured worker's position on appeal (presumably whether the worker is the appellant or the appellee) is "frivolous or unreasonable" or if an injured worker brings an appeal in bad faith, the commission may award an attorney fee against the worker if the opposition is successful. The position taken by the appellee in this case was neither unreasonable nor frivolous. Without suggesting the appellee was so, we observe generally that being wrong, erroneous, mistaken or even "wide of the mark" is not the same as being unreasonable. As the employer was the appellant, we need not consider whether the injured worker took the appeal in bad faith.

⁶ Unlike AS 23.30.145(b) awards by the board, which are based on the "successful prosecution of the claim," awards by the commission are based on status as a "successful party." The distinction is an important one, recognized in *Adamson*, 819 P.2d at 895. Before the board, the claim must ultimately succeed. However, successful party status is like prevailing party status, which "does not automatically follow if the party receives an affirmative recovery but rather it is based upon which party prevails on the main issues." *Hutchins v. Schwartz*, 724 P.2d 1194, 1204 (Alaska 1986), citing

Our decision left the parties in their original positions before the board's order was issued, and directed the board to obtain a remand from the Superior Court and make a decision after considering the evidence. The employee may prevail on his claim for additional temporary compensation if the board determines that the date of medical stability was yet to come. We will not speculate on the amount the employee ultimately will obtain as a result of his claim; therefore, we do not base our award of an attorney fee on the amount of money the claimant-employee obtained or lost as a result of our decision. In this case we focus on the success of the appellant and appellee on the issues presented to the commission.

The appellant employer argued that the board had jurisdiction but had failed to properly consider the evidence it presented and asked that the decision be reversed. We rejected the argument that the board had jurisdiction, but we accepted in part the argument that the board was required to at least consider the evidence presented by the employer. The initial effect of our decision is that the board's decision is reversed and the employer will have the opportunity to obtain board consideration of its evidence at a board hearing following a remand from the Superior Court. In this sense, the appellant was successful.

However, the appellee was equally successful on the main issue. The commission ultimately accepted the appellee's argument that the commission lacked jurisdiction over this case because the core of the claim was on appeal to the Superior Court. However, the commission did not accept the second stage of the appellee's argument – that the board's order on the employee's claim was mere enforcement of the board's prior order (on appeal to the Superior Court) and should be left undisturbed.

Continental Insurance Co. v. United States Fidelity & Guaranty Co., 552 P.2d 1122, 1125 (Alaska 1976) *disapproved on other grounds*, *Farnsworth v. Steiner*, 638 P.2d 181 (Alaska 1981). A party who successfully defeats a claim of great potential liability may be the prevailing party even if the other side is successful in receiving an affirmative recovery. *Id.*, *Alaska Placer Co. v. Lee*, 553 P.2d 54, 63 (Alaska 1976), see also *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 314 n. 5 (Alaska 1972).

We cannot award even partial fees to the appellant because we cannot award fees against an injured worker unless the position taken by the injured worker was frivolous or unreasonable. The appellant made no request for an attorney fee, thereby conceding that the appellee's position was neither frivolous nor unreasonable. We do not find the appellee's position was frivolous or unreasonable.

Although the appellee succeeded in persuading the commission that it did not have jurisdiction, the commission rejected other portions of the appellee's argument. However, our rejection of those portions of the appellee's argument does not foreclose the employee from the possibility of ultimate success on his claim. After careful consideration of the success of the appellee on the main issue of jurisdiction, we find that the appellee was at least 80% successful on the main determinative issue. We find the appellee's fee rate and hours are reasonable.⁷ We conclude that a fee award of \$1,980.00 (80% of the requested fee) represents a fully compensatory and reasonable fee. Legal costs were not sought, so we do not address them.

The commission AWARDS the appellee \$1,980.00 as an attorney fee, payable by the appellant.

Dated: April 14, 2006

Alaska Workers' Compensation Appeals Commission

Signed

Philip E. Ulmer

Signed

Jim Robison

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision. It becomes effective when filed in the office of the Commission unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings

⁷ The commission may "determine" that a fee is fully compensatory and reasonable and "find" that a workers' position on appeal was frivolous or unreasonable or the appeal was taken in bad faith. AS 23.30.008(d).

