

Alaska Workers' Compensation Appeals Commission

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

vs.

Randy A. Whitaker,
Appellee.

Memorandum Decision
and Order on Motion to Stay
Decision No. 001 December 29, 2005

AWCAC Appeal No. 05-008
AWCB Decision No. 05-0330
AWCB Case No. 200207685

Memorandum Decision and Order on Motion for Stay of Alaska Workers' Compensation Board Decision and Order No. 05-0330, Fairbanks Panel, by Fred G. Brown, Chairman, and Chris Johansen, Board Member for Management.

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

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

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

On December 28, 2005, a commission panel, Jim Robison for employees, Philip Ulmer for employers, and the Chair, heard argument on a motion for a stay of the Alaska Workers' Compensation Board's hearing panel decision of December 14, 2005. Richard Wagg represented the appellant and Robert Beconovich appeared for the appellee.

The commission may grant a stay of payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage"¹ and that the appeal raises "questions

¹ AS 23.30.125(c).

going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus more deliberate investigation.”² Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable harm *and* “the existence of the probability of the merits of the appeal being decided *adversely to the recipient* of the compensation payments.”³

In addition to his memorandum, Mr. Wagg submitted an affidavit with attachments. There was no additional evidence presented at the hearing. Appellant argued that the appellant, once it pays compensation and medical benefits ordered paid by the board panel, will be unable to recover them from the appellee if the appeal is decided in the appellant’s favor. The Supreme Court, in *Croft v. Pan Alaska Trucking, Inc.*,⁴ interpreted AS 23.30.155(j) so as to make overpayments of benefits and compensation (including payments to the employee’s attorney) not recoverable except through deduction from future payments of compensation, if owed.⁵ In view of the likelihood that no future compensation would be owed once the appellee reached medical stability, Mr. Wagg argued, the appellant would be irreparably harmed because it had no means of recovering amounts paid if successful on appeal. Mr. Wagg conceded that in the usual case, the burden posed by AS 23.30.125(c) militates against a stay of ongoing benefits; in this case, he argues, there is such a “clear showing of

² *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992). The language of AS 23.30.125(c) was taken from the Supreme Court’s decision in *Olsen Logging Co.* Mr. Wagg thoroughly discussed in his memorandum the balancing test derived from that case and to be applied in requests for stays on appeal.

³ AS 23.30.125(c) (emphasis added).

⁴ 820 P.2d 1064 (Alaska 1991).

⁵ Although the Supreme Court noted other states’ statutes making provision for employer recoupment from, among other sources, second injury funds, 820 P.2d at 1067, n. 3, the Alaska State Legislature has declined to act on the Court’s suggestion.

probable success”⁶ on the merits that the balance of hardships tips in the appellant’s favor even as to the on-going future periodic payments of compensation.

Mr. Beconovich argued that burden was not met where, as here, his client, at age 39, resides with his parents⁷ because he has no income.⁸ Mr. Beconovich argued vigorously that his client was unable to support himself due to his injury. Moreover, he argued that, given the procedural history, the appellant had not raised sufficiently serious questions regarding the merits of the board’s decision as to warrant even a stay of the lump sum of past due compensation and benefits. However, Mr. Beconovich presented no evidence the appellant would be able to repay amounts overpaid from future compensation⁹ in the (in his view) unlikely possibility the appellant prevailed on appeal. Indeed, Mr. Beconovich represented that the appellee’s condition was likely to become medically stable sometime in February 2006, reducing the period the appellee would continue to receive future periodic payments of compensation from which any overpayment could be satisfied.

We note the December 2004 decision of the board in this case¹⁰ is the subject of an appeal to the Superior Court, and that the parties represented that a stay of

⁶ *Olsen Logging Co.*, 832 P.2d 174, at 175-175.

⁷ Mr. Beconovich did not say where Mr. Whitaker currently resides, but the Commission notes that the compensation report submitted by appellant (Exhibit A) shows an address in Hobbs, New Mexico, a town of about 30,000 located on the southeastern edge of New Mexico, close to the Texas border.

⁸ The appellant did not dispute that the appellee is 39 years old, resides with his parents, and has no income. The appellant noted the appellee testified he was indigent at the board hearing. The appellant did dispute the *reason* for the lack of income, asserting that it was not due to his 2002 knee injury.

⁹ As for example, overpaid temporary total disability compensation may be recovered from an anticipated permanent partial disability award.

¹⁰ *Randy A. Whitaker v. Doyon Drilling, Inc.*, AWCB Dec. No. 04-0301 (December 21, 2004).

payment of benefits awarded pending that appeal was denied by the Superior Court.¹¹ If the issues presented in the motion for stay in this appeal and to the Superior Court are the same, we would be reluctant to reach a conclusion at odds with the Superior Court in the same case.¹² We were not informed of the basis for the Superior Court's decision and we are not willing to speculate on it.

The commission finds that the appellant has presented evidence, not seriously disputed, that it will be irreparably damaged if it is required to make payment to the appellee as ordered by the Alaska Workers' Compensation Board on December 14, 2005. The commission refers to the evidence presented of the rate of compensation owed (\$585.34 per week), the disputed period which is the subject of the board's order (July 17, 2005 to December 14, 2005), the rate of attorney fees owed thereon pursuant to board order (10 percent), and interest, all totaling approximately \$14,074.¹³ In view of Mr. Beconovich's representation of the projected period of temporary disability compensation, the absence of evidence that future compensation will be owed, and the impossibility of obtaining repayment of compensation paid to the appellee or attorney

¹¹ Neither the text of the denial of stay, nor the reasons for the denial, were presented to the commission. The Superior Court's reasons for denial of stay would be useful to the commission's deliberations, and the appellee (as the party advocating that the Superior Court retains jurisdiction) is directed to provide a copy of the Court's decision to the commission. The parties stated that the appellant sought review in the Supreme Court of the denial of the stay. If the Supreme Court issued an order denying review, the appellee shall provide a copy of that order also.

¹² Mr. Beconovich pointed out that the policy reasons for denying a stay on appeal of continuing compensation would be undercut if an employer could "unilaterally" controvert the on-going benefits and re-litigate the same issues as in the pending appeal before the board. Mr. Wagg responded that if an employer is unable to change payments to meet changes in the employee's status after an appeal is taken, the value of an appeal is undercut and the employer is deprived of a right, if Mr. Beconovich argues correctly, that the employee may exercise.

¹³ The board also ordered payment of "penalties" but, as Mr. Beconovich noted, failed to make specific findings regarding the penalty owed or the statute on which the penalty was based. No evidence of medical benefits unpaid in this period was presented.

fees to his attorney from any other source,¹⁴ the Commission finds that the appellant will be irreparably damaged if required to pay the past due sum and the appeal is later determined in the appellant's favor.

The commission remains troubled by the question of the probability of the merits of the appeal being decided adversely to the recipient of the compensation. There is no evidence presented the employee has other income or possible employment.

The appellant argues that the board in December 2005 failed to make any finding on the issue before it (appellee's claim, reported by Mr. Beconovich, was for continuing temporary compensation, interest, attorney fees, and a penalty for a frivolous controversion), and the Board as a matter of law erroneously determined it lacked authority to determine medical stability once temporary disability compensation was awarded based on a finding that the employee is not medically stable, except pursuant to a motion for modification of the prior award. The appellant argues that AS 23.30.185¹⁵ is self-executing; that is, that an award of temporary total disability compensation is subject to the condition that the employee is not medically stable, that the disability continues, and that the employee is alive to receive the compensation. The board panel's reliance on *Underwater Construction Inc. v. Shirley*,¹⁶ the appellant asserts, is clearly mistaken because of the distinguishing nature of temporary disability compensation. Mr. Wagg argues that Mr. Beconovich concedes as much by stating that

¹⁴ AS 23.30.155(j); *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-1067 (Alaska 1991).

¹⁵ AS 23.30.185 provides:

In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages 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.

¹⁶ 884 P.2d 156 (Alaska 1994). The Board panel also cited *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996).

the appellee's temporary disability compensation will cease sometime in February 2006, when he is anticipated to be medically stable and ready for a permanent impairment rating.

Mr. Beconovich, on behalf of the appellee, argues that once an employee is determined not to be medically stable, and temporary disability compensation awarded, that award cannot be altered except through a motion for modification. The employer's subsequent controversion was nothing more than a gambit to re-litigate the same issues. In this case, he argued, there was no new evidence supporting a motion for modification and the employer-appellant withdrew its motion for modification because it had no such evidence. Finally, the board, while it improperly failed to make findings on the issue of penalty in the claim before it, was unable to modify its December 2004 order because (1) there was no motion for modification before it and (2) there was no stay of the appeal granted by the Superior Court permitting the board to exercise its jurisdiction. This appeal, Mr. Beconovich argues, has no merit because the subject matter of this appeal is already the subject of an appeal to the Superior Court, and regardless of his own complaints regarding the board panel's decision, the board had no authority to alter its December 2004 decision.

The commission, on reviewing the appealed board panel decision finds it to be insufficient, in view of the prior decisions and pending appeal to the Superior Court, to determine what was in the mind of the board panel. In particular, the commission is concerned about the issue of the board's jurisdiction and authority to decide the issues presented by the claim it had before it.

The question raised by the appeal of whether an open award of temporary total disability compensation, once made, cannot be altered by either party except by motion for modification, or if such awards incorporate self-executing conditions set out in AS 23.30.185, is a serious and substantial question, which is a meritorious subject for appeal to this commission. However, the question becomes more academic if, because of the Superior Court appeal, the board had no jurisdiction or authority on November 17, 2005, to determine that the employee was, or was not, medically stable, either as a

fundamental part of the employee's claim or because the employee's status as temporarily totally disabled, ordered in December 2004, can only be altered if the appeal is stayed to allow the board opportunity to exercise jurisdiction. The commission cannot determine if there is, or is not, a clear probability that the appeal will be decided adversely to the recipient of compensation. The commission also desires clarification in order to avoid conflict with the Superior Court.

The commission respects the jurisdiction of the courts and is cognizant of the basic rule that an administrative agency cannot have jurisdiction of a case at the same time as the courts. On the other hand, we note that the Board panel in its December 2004 decision specifically "reserved jurisdiction" to resolve disputes (presumably *future* disputes)¹⁷ in the on-going workers' compensation case and require the Board's resolution. The board panel did not resolve the tension between competing policies, and there was insufficient opportunity for the parties to fully address it at oral hearing.

Therefore, the commission orders

1. The motion for stay of payment of continuing periodic compensation payments, attorney fees thereon, awarded by the board on December 14, 2005, and benefits accruing thereafter, is DENIED;
2. The parties are requested to file simultaneous briefs, not exceeding 15 pages, addressing, with appropriate legal citations, the following questions:
 - a. Did the board have jurisdiction or statutory authority to consider evidence of medical stability on November 17, 2004;
 - b. What is the legal basis of the board's position it has no authority to act under AS 23.30.130, even on its own motion, or the employee's claim, *if* that was the Board's position on November 17, 2004;
 - c. Does it matter if the person seeking determination of medical stability is the employer (for the purpose of ceasing payment) or the employee

¹⁷ *Whitaker*, AWCB Dec. No. 04-0301 at 8.

(for the purpose, for example, of obtaining a lump sum payment of permanent partial disability compensation)?

In the interests of efficiency and a prompt resolution of this matter, the parties are directed to address as well any points in this decision they believe should be reconsidered by the Commission. The parties are directed to file their briefs within 20 days after the date of distribution of this order. The parties may file an opposition, not exceeding 10 pages, within 10 days thereafter. No replies will be permitted without order of the Chair.

3. The motion for stay of payment of compensation and benefits, together with interest, attorney fees, and penalties thereon, awarded December 14, 2005 for the period of time between July 17, 2005 and December 13, 2005, is GRANTED, conditioned upon provision of a supersedeas bond equal to 125 percent of the total amount. The bond provided by the appellant is accepted and approved as to form, pending replacement by a bond in the correct amount.

4. The commission will reconsider its decision on the motion for stay on receipt of the briefing ordered in paragraph 2 above. No further oral argument will be held unless requested by the commission.

Date: December 29, 2006

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

Today, 12/29/06, mailed and faxed to Wagg & Beconovich, faxed to AWCB – Fbx and WCD Director.

Signed

Kristin S. Knudsen