

**Case:** *Lowe's HIW, Inc. and Specialty Risk Services, Inc. vs. Pamela G. Anderson*, Alaska Workers' Comp. App. Comm'n Dec. No. 113 (July 23, 2009)

**Facts:** Pamela Anderson (Anderson), a kitchen designer for Lowe's HIW, Inc. (Lowe's), experienced low back pain while lifting and rotating a cabinet in April 2003 and when reaching for a clipboard in May 2003. She acknowledged that she had pre-existing spinal disease. The board considered whether the 2003 injuries so aggravated, accelerated, or combined with her pre-existing spinal disease as to be a substantial factor in bringing about her ensuing disability and need for medical treatment. The board issued its decision on May 19, 2009.

Before the commission, Lowe's sought a stay of the board's order directing payment of a lump sum of permanent partial impairment (PPI) compensation and past temporary total disability (TTD) compensation, and past medical benefits related to neck surgeries. The appellants also asked that the board's order directing payment of TTD compensation in the future be stayed, as well as all payment of medical benefits, past and future, related to Anderson's neck surgery. Lowe's stated in the hearing on the motion that it was willing to provide a supersedeas bond.

**Applicable law:** 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," AS 23.30.125(c) and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus for more deliberate investigation." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992). Per AS 23.30.125(c), 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." (Emphasis added.)

"The harm . . . is considered irreparable as a matter of law in workers' compensation appeals when there is no prospect that the sum paid by the appellants pursuant to board order may be recovered from future compensation paid to the employee." Dec. No. 113 at 6 (citing *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1067 (Alaska 1991), interpreting AS 23.30.155(j) so as to make overpayments not recoverable except through deduction from future payments of compensation, if owed).

Under AS 23.30.128(c) the commission may take evidence and make findings of fact on motions for stay.

**Issue:** Should the commission issue a stay?

**Holding/analysis:** The commission stayed the lump-sum PPI and TTD payments as well as the past medical expenses. On the lump sum payments, the commission concluded that the employer would suffer irreparable harm if successful on appeal because the board had ordered it to pay more than the undisputed amount owed and Anderson was unlikely to have sufficient future compensation to allow the employer to recover overpaid sums. As to the past medical expenses, the commission found that

“medical expenses, which are paid to providers, cannot be recovered from the appellee, even from future compensation.” Dec. No. 113 at 10.

In terms of balancing the hardships, the commission found it tipped in favor of the employer as to the lump sums and past medical expenses. Anderson presented no evidence that she was dependent on the lump sum for payment of daily living expenses. Although she argued that she was permanently and totally disabled and would be owed benefits the rest of her life, no PTD claim had been filed and no evidence was submitted to support that argument. Moreover, the commission noted that Anderson had been paid years of TTD, PPI, and reemployment stipend free of tax liability.

In terms of whether the employer raised serious and substantial questions on appeal, the commission determined that it had, specifically as the board’s interpretation of the presumption of medical stability and the board’s assignment of the burden of proof and weighing of the medical opinions. In reading the board decision, the commission observed that “[t]he board here appears to assign the burden to prove and persuade to the physician (or the proponent of the physician’s opinion) instead of the claimant at the third stage of the presumption analysis. Alternatively, the board appears to have made a finding, and then required the physician’s opinion to dissuade the board from its finding, instead of weighing the opinions first and then making a finding.” Dec. No. 113 at 10. The commission ordered the employer to obtain a supersedeas bond in the amount of \$337,722. *Id.* at 13.

The commission did not stay the board’s order for attorney fees and legal costs because there was no evidence “on which to base a finding that divides the attorney fees attributable to the compensation and medical payments stayed from the fees attributable to the benefits the appellants conceded were due. . . .” *Id.* at 11.

The commission did not stay future TTD payments because the employer did not demonstrate the possibility of irreparable harm. If the employer succeeded on appeal in terms of its arguments about the future TTD payments, it could recoup any overpayment from the additional PPI lump sum. The commission therefore did not consider whether the employer demonstrated the probability of success on the merits. *Id.* at 12.

**Note:** Dec. No. 130 (March 17, 2010) decided the merits of the appeal.