Alaska Workers' Compensation Appeals Commission

S&W Radiator Shop and Alaska National Insurance Co.,
Appellants,

vs.

Louise Flynn,
Appellee.

Memorandum Decision
and Order on Motion to Stay
Decision No. 005 February 24, 2006

AWCAC Appeal No. 05-009
AWCB Decision No. 05-0329
AWCB Case No. 199428635

Memorandum Decision and Order on Motion to Stay Alaska Workers' Compensation Board Decision No. 05-0329, issued December 14, 2005 by the Northern panel at Fairbanks by Fred G. Brown, Chairman, and Chris Johansen, Board Member for Management.

Appearances: Robert J. Bredesen, Russell, Tesche, Wagg, Cooper, and Gabbert, for the appellants S & W Radiator Shop and Alaska National Insurance Co.; Paul B. Eaglin, Eaglin Law Office, for the appellee Louise Flynn.

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

Commissioner: John Giuchici, Marc Stemp, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

The appeals commission heard argument Monday, January 30, 2006, on the motion for stay filed by the appellants. The appellants were represented by Robert Bredesen; the appellee was represented in this proceeding by Paul Eaglin, who appeared, he stated, for the purpose of asserting Flynn's right to protest being made a party to the appeal without first being served by the appeals commission with notice of the appeal and copies of the commission's regulations and the Alaska Workers' Compensation Act. At the close of the hearing, the appeals commission requested briefing from the parties on the issue whether the appellee was a "party" with adequate notice of the appeal.[1] The appeals commission denies the appellee's request that she

[1] Both Mr. Eaglin and Mr. Bredeson submitted briefs within the time permitted and the commission thanks them for their arguments.

be dismissed from the appeal for lack of notice of appeal and grants the appellant's motion for a stay.

Flynn is a party to the appeal.

Flynn argues that she is not a party unless she is specifically joined as a party through individual service upon her, relying on *Scammon Bay Assoc. v. Ulak.*[2] She argues that service upon her attorney in the board proceedings is inadequate to join her as a party, and that the commission (not the appellant) is obligated to serve Flynn directly with notice of the hearing and of the appeal.[3]

AS 23.30.125 (c) provides that if a compensation order is "not in accordance with law or fact, the order may be set aside . . . through proceedings in the commission brought by a party in interest *against all other parties to the proceedings before the board*." 8 AAC 57.020(a) provides that "All parties before the board when the board decision or order was entered are parties to the appeal." 8 AAC 57.020(b) provides that all parties who did not file an appeal are "appellees, regardless of their status before the board." Because Ms. Flynn was a party to the proceedings before the board, she is the adverse party to the appeal, the appellee, by operation of law.

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[2] 126 P.3d 138, 2005 WL 3508663 (Alaska December 23, 2005). The analogy Flynn draws between herself, the party-in-interest before the board whose decision is appealed to the commission, and a non-party to an original personal injury action in superior court, is not helpful. More analogous would be the position of a successful plaintiff in a superior court action whose verdict is appealed by the defendant. In such cases, notice of appeal is provided to the plaintiff's attorney, if represented. Rule of Appellate Procedure 514.

[3] We find the argument that the appeals commission must provide service of the notice of appeal (with copies of the regulations and statutes) to Flynn directly is without merit. Flynn argues that the board serves notices of hearing directly on the claimant, even if represented, and that defense attorneys send notices of employer medical evaluations to the employee. However, the board's regulations *require* that the board "serve notice of time and place of hearing upon all parties," 8 AAC 45.060(e), and AS 23.30.110(c) requires that the board give "each party" 10 days notice of the hearing, "either personally or by certified mail." Similarly, the board's regulations *require* employers to give notice to the employee and the employee's representative of employer medical evaluations. 8 AAC 45.090(d)(1). No such limitation on the form of service is included in AS 23.30.125 or 128. There is no requirement that the commission's procedural regulations match the board's regulations.

Flynn next argues that she was not given notice of the appeal and therefore she cannot be a party. We note that Flynn stated that she did receive actual notice of the appeal and the hearing on the motion for stay and that Flynn participated in the hearing on the motion for stay. On January 9, 2006, Eaglin had written to the commission (albeit at the wrong address) to challenge his client's "joinder" as a party. The appellant then provided service on January 10, 2006, to Flynn's post office box in Eagle, Alaska, where she resides. She argues that the commission's regulation, providing that service "upon a party represented by an attorney is upon the attorney unless the chair, panel, or commission orders service upon the party, as well as the attorney," 8 AAC 57.040, is not sufficient to support service because her attorney did not enter an appearance before the appeals commission.

We disagree. Eaglin's faxed letter of January 18, 2006, clearly indicates that he intends to act on Flynn's behalf "with respect to any and all aspects that are necessary to preserve and to protect to her benefit the favorable ruling that she obtained by the December 14, 2005 decision of the Alaska Workers' Compensation Board." This is a general entry of appearance, regardless of Eaglin's later attempt in the hearing on the motion for stay to limit his appearance. He participated in the telephone conference setting the hearing date and apparently notified his client of the hearing, as she was present. We consider that notice to Eaglin complied with the commission regulations.

Flynn's argument that Eaglin did not represent her in a forum except the board so as to receive service of the notice of appeal and the notice of the hearing has little merit. Eaglin clearly represented Flynn in her claim for workers' compensation. Eaglin had not filed a motion to withdraw under board regulations, 8 AAC 45.178(b) at the time the appeal was filed. For purposes of notifying the employee of further proceedings in respect of the board's decision, he was still her representative. The commission is, it is true, a different quasi-judicial agency, but is yet within the same Department of Labor and Workforce Development and the appeal is of a board decision on a claim that Eaglin prosecuted for Flynn. Once Eaglin wrote his January 18, 2006 letter, he had entered a general appearance and clearly expressed intent to represent Flynn and defend the decision of the board. Therefore, he was her representative for purposes of receiving notice of the hearing on the stay.

The board's order is stayed pending the appeal.

The commission may issue a stay of a board order when "the party filing the application would otherwise suffer irreparable damage."[4] We find at the outset that the board's order does not include an immediate award of immediate ongoing payment of periodic compensation.[5] The party seeking the stay, if no on-going periodic compensation payments are to be stayed, must show that there are "serious and substantial questions going to the merits of the case" and that the injury that would result from the stay can be indemnified by a bond or is relatively slight in comparison to the injury that the party seeking the stay will suffer if it is not granted. This is a "balance of the hardship approach" the Supreme Court described in *Olsen Logging Co. v. Lawson*,[6] and it is the test we apply here.

Flynn, a seasonal employee, resides in Eagle, and is engaged in her own pursuits. The injury in question occurred more than 10 years ago. Although she has not worked for the appellant employer for nine years, she is not totally disabled. The employer has paid compensation in the past, including permanent partial impairment compensation. Compensation reports submitted by the appellant reflect payment of more than $30,000 in permanent impairment compensation. The question addressed by the board's decision concerns payment for a future removal of screw and plate

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[4] AS 23.30.125(c). When continuing future periodic compensation payments are at issue, the commission may not issue a stay in the absence of a showing of the probability of the merits of the appeal being decided adversely to the recipient of the payments in addition to the showing of irreparable damage by the appellant. *Id.*

[5] The board's order encompasses a payment of temporary total disability compensation during a future period of convalescence from surgery, *if* the employee undergoes the surgery. However, the period has not commenced and surgery is not even scheduled. Flynn is not, at this time dependent on continuing periodic compensation for "life's daily necessities." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska, 1992) *citing Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085, 1087 (Alaska 1981).

[6] 832 P.2d 174, 176 (Alaska, 1992). We apply the same standard where continuous or emergent medical care, beyond the first two years following the date of injury, is not required "for the process of recovery".

related to a past fusion to Flynn's left wrist. Flynn stated to the commission in hearing that she has no immediate plans for the surgery and no surgery is presently scheduled.

On the other hand, the employer would be unable to recover the payment once extended to the physician and hospital, as well as whatever additional benefits may be payable to the employee and her attorney if, during the pendency of the appeal, the employee decided to undergo the surgery.[7] No other employer has been identified by the board as a possible source of payment.[8] If the employer is required to make the medical expense payments directed by the board's order, and the decision on appeal favors the employer, the employer's loss is irreparable because there is no source, except the employee's future compensation, the board can require to reimburse the employer. Allowing for the time that has passed since the injury, the compensation the employee has received, the non-emergent nature of the surgery, the relatively short delay that would be suffered by permitting the appeal to go forward, and the possibility of prompt payment if the employee obtains the surgery and prevails in this appeal, we find that the balance of hardships tips in favor of the employer.

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[7] In *Croft v. Pan Alaska Trucking, Inc.,* 820 P.2d 1064, 1066 (Alaska 1991), the court interpreted AS 23.30.155(j) to be the exclusive remedy available to an employer to recoup a previously paid award following a successful appeal. If an employer is forced to make a lump sum payment and will not, if successful on appeal, have an obligation to make continuing payments of compensation, the employer is without a remedy to recover the lump sum payment. "In this situation, the employer's harm is not only irreparable but an appeal becomes a meaningless exercise since, win or lose, the money once paid can never be recovered." *Olsen Logging,* 832 P.2d at 171. In addition, we note that while the Supreme Court has not ruled that medical benefits paid to a hospital or physician can be recovered from a claimant under AS 23.30.155(j), the reasoning of *Croft* suggests that medical benefits paid on behalf of an employee, like attorney fees, may be subject to the limits of AS 23.30.155(j). However, the question was not briefed, and a decision on it is not necessary for our purposes here, so we do not decide the issue now. The cost of surgery is very likely to exceed 20 percent of the temporary total benefits ($310.53/week) Flynn would be entitled to receive during convalescence. There was no evidence she would be entitled to additional permanent partial impairment compensation as a result of the proposed surgery.

[8] AS 23.30.155(d) makes explicit provision for reimbursement by another responsible employer of "temporary disability benefits."

We find that the appellant raised serious and substantial questions going to the merits of the board's decision below. Our examination of the decision appealed leaves us with questions regarding the basis for the board's decision, notably that no findings were made regarding the compensability of the condition for which benefits are sought, to support a conclusion that future medical benefits are owed. This does not mean that no evidence exists to support such a finding, but the absence of findings in the decision compels us to agree that the issues raised by the appeal require "more deliberate investigation."[9]

Our statute commits to the board the power to "hear and determine all questions in respect to the [injured worker's] claim."[10] The absence of findings regarding the compensability of the employee's condition for which benefits are awarded renders a considered and deliberate investigation of the board's decision difficult if not impossible. The standard for determining whether an absence of findings of fact on the cause of an injury was set out in *Bolieu v. Our Lady of Compassion Care Center.*[11] We will look to (1) whether the board failed to decide a material and contested issue; and (2) whether the difference between what the employee "pled" in her claim and what the employee offered as proof during the hearing was so great as to be fatal to her claim.[12] We will not "fill the gap" by making our own determination from the record, for the power of making findings of fact rests with the board.[13] We give notice to the parties of the standard we will apply so that it may be addressed in the briefs filed in this appeal.

Order.

For these reasons, we STAY the board's December 14, 2005 order pursuant to our authority under AS 23.30.125(c), and we DENY the motion to dismiss the appellee

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[9] *Olsen Logging*, 832 P.2d at 176, *quoting A. J. Industries Inc., v. Alaska Pub. Service Comm'n*, 470 P.2d 537, 540-541 (Alaska 1970).

[10] AS 23.30.110(a).

[11] 983 P.2d 1270, 1274-1275 (Alaska 1999).

[12] 983 P.2d at 1274.

[13] 983 P.2d at 1275.

from the appeal. The parties may seek relief from stay if there is a material change in conditions.

Date: *February 24, 2006* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Marc Stemp, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair