

Alaska Workers' Compensation Appeals Commission

Peak Oilfield Service Co. and Liberty
Mutual Fire Ins. Co.,
Appellants,

vs.

James L. Lindgren,
Appellee.

Memorandum Decision and
Order on Motion to Stay
Decision No. 004 February 23, 2006

AWCAC Appeal No. 06-004
AWCB Decision No. 05-0321
AWCB Case No. 200220655

Memorandum Decision and Order on Motion to Stay Alaska Workers' Compensation Board Decision and Order No. 05-0321, December 9, 2005 and Alaska Workers' Compensation Board Decision and Order on Reconsideration No. 06-0007, January 9, 2006, by the Southcentral Panel at Anchorage, Darryl Jacquot, Chairman, and Patricia Vollendorf, Board Member for Labor.

Appearances: Matthew Teaford, Delisio, Moran, Geraghty & Zobel, for the appellants Peak Oilfield Service Co. and Liberty Mutual Fire Ins. Co.; Michael Jensen, Jensen Law Office, for the appellee James L. Lindgren.

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

Commissioners: Philip Ulmer, John Giuchici, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

The commission heard argument on the motion for stay by the appellants in this case on January 30, 2006. The appellants were represented by Matthew Teaford of Delisio, Moran, Geraghty & Zobel; the appellee was represented by Michael Jensen of the Jensen Law Office. At the commission's request, the parties supplied copies of the missing pages of Dr. Paton's deposition. The commission stays the payment of certain lump sums of compensation and interest but denies the motion to stay on-going periodic payment of compensation and medical benefits.

Introduction.

James Lindgren was an insulator for Peak Oilfield Service Co., located on the Kenai Peninsula. Lindgren filed a notice of injury for a lower back injury while tossing

bags of insulation into a dumpster on September 9, 2002. Lindgren's employer initially disputed the injury, but began payment after he filed a claim for compensation in December 2002. Peak Oilfield's insurer paid temporary disability compensation until March 14, 2003. A hearing before the board resulted in an award of temporary disability compensation from March 14, 2003 and continuing indefinitely into the future, medical benefits, statutory interest, and attorney fees of \$28,302.

Appellant's argument for a stay.

The appellant argues in the motion for stay that the board improperly awarded temporary total disability compensation beyond a date of medical stability of no later than September 9, 2004. AS 23.30.185 is, appellant argues, a self-executing prohibition on payment of temporary disability compensation during a time that the employee is not medically stable, which the board ignored in its award of compensation after September 9, 2004. 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.*,¹ 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.² In view of the amount of compensation involved for more than a year of temporary total disability compensation, the appellant is unlikely to recover the amount owed from future compensation that would be owed for permanent partial disability compensation or periods of instability. Therefore, the appellant would be irreparably harmed because it had no means of recovering amounts paid if successful on appeal. The appellant also argues that the board's allegedly punitive disregard of the SIME opinion, and the absence of dispute regarding medical stability,

¹ 820 P.2d 1064 (Alaska 1991).

² 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, but the Alaska State Legislature has declined to act on the Court's suggestion.

creates such a “clear showing of probable success”³ 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.

Appellee’s arguments against a stay.

The appellee argues that with regard to continuing benefits, and those awarded after September 2004, the appellant has failed to show the likelihood of prevailing on appeal, based on the Supreme Court’s decision in *Alyeska Pipeline Service Co. v. DeShong*.⁴ The appellee argues that in *DeShong* the Supreme Court found that the treating physician’s recommendation for further surgery was “clear and convincing evidence” on which the board could rely to overcome a presumption of medical stability. The appellee also argues that the issue regarding the SIME is one committed to the board’s exclusive domain of determining credibility, therefore there is no “serious and substantial question” on appeal to support a stay of even lump sum benefits. Finally, the appellant argues that the stay request is untimely as it was filed on the 14th day following the decision; the day payment is due, and therefore any order of a stay is outside the authority of the commission.

There is insufficient demonstration of the probability of a decision on appeal being adverse to the appellee to support a stay of on-going periodic payment of compensation.

This is a motion to stay payment of on-going temporary disability compensation as well as a lump sum of past compensation, costs and attorney fees. 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”⁵ 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

³ *Olsen Logging Co.*, 832 P.2d 174, at 175-175.

⁴ 77 P.3d 1227 (Alaska 2003).

⁵ AS 23.30.125(c).

ground for litigation and thus more deliberate investigation.”⁶ Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable damage *and* “the existence of the probability of the merits of the appeal being decided *adversely to the recipient* of the compensation payments.”⁷

The appellants raise serious and difficult questions as to the board’s actions regarding the SIME opinion and the request for a second SIME, apart from the issue of the credibility of the report. However, those questions are not so serious as to compel a conclusion that it is probable that the ultimate outcome regarding continuing future periodic compensation will be adverse to the recipient of the compensation. Similarly, the issues regarding the board’s interpretation of AS 23.30.185 are serious, difficult questions that are a fair ground for litigation, and call for a more deliberate investigation. But, as to on-going periodic payments, we cannot say that the questions raised are so serious, and the board’s decision on its face so defective, as to compel a conclusion that it is probable a decision on appeal will be adverse to the recipient of the compensation. For those reasons, we deny a stay as to periodic payments of temporary disability compensation due after the date of the decision appealed.

The balance of the hardships tips in favor of the appellee with regard to the compensation owed for the period between March 14, 2003 and September 9, 2004.

The commission finds that the appellant has presented evidence that if an appeal is favorable to the appellant, the appellant’s ability to recoup compensation is limited. The appellant will be irreparably damaged if it is required to make payment to the appellee as ordered by the board and is later unable to recoup the sum paid if successful.⁸ However, balanced against this loss must be (1) possibility that the appellee will be a future recipient of compensation (we note that no award of

⁶ *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992).

⁷ AS 23.30.125(c) (emphasis added).

⁸ AS 23.30.155(j); *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-1067 (Alaska 1991).

permanent partial impairment compensation has been made, nor of vocational reemployment benefits), (2) the seriousness and difficulty of the questions raised on appeal, and (3) the speed at which this commission is required to render a decision on appeal, which limits the exposure of the appellant to future loss. While we agree that the questions raised by the appellant are serious, for the compensation awarded for this period of time we cannot say that the balance tips decidedly in the favor of the appellant in view of the possibility of the award of future compensation.⁹ We therefore deny a stay of that portion of the board's order directing payment of compensation for the period from March 14, 2003 to September 9, 2004.

The balance of the hardships tips in favor of the appellant with regard to the compensation owed between September 10, 2004 through January 9, 2006.

Again, the commission finds that the appellant has presented evidence that if an appeal is favorable to the appellant, the appellant's ability to recoup compensation is limited. The appellant will be irreparably damaged if it is required to make payment to the appellee of the compensation owed for the period from September 10, 2004 through January 9, 2006, as ordered by the board, and is later unable to recoup the sum paid if successful.¹⁰ This represents a large¹¹ sum, and the questions raised by the appellant regarding the board's decision are more serious. Although the appellee cites to *DeShong* in support of his position that a doctor's recommendation of treatment is sufficient to be "clear and convincing evidence," we believe the appellee has not read *DeShong* carefully. First, the "clear and convincing evidence" *DeShong* produced included multiple recommendations for a second opinion, surgery and a successful outcome from the surgery; second, the Supreme Court went beyond reliance on the recommendation of treatment and successful treatment in arriving at its

⁹ The period of time is approximately 78 weeks.

¹⁰ AS 23.30.155(j); *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-1067 (Alaska 1991).

¹¹ The period is almost 70 weeks.

conclusion: "Given DeShong's confusion *and our unwillingness to find that a worker has waived procedural rights to seek compensation unless the worker is clearly informed of those rights*, we agree with the Superior Court's resolution of this issue."¹²

There is no issue in this case of confusion of rights contributing to a delay. The recommendation appellee relies on is not buttressed by the additional factors in *DeShong* and is undermined by the appellant's arguments regarding the totality of Dr. Paton's opinion. The questions raised by the appellant on the issue of medical stability are sufficiently serious, particularly as to the period between September 9, 2004 and January 2006, and the compensation awarded for this period sufficiently large, that it is unlikely, if the appellant is successful on appeal, that the appellant will be able to recoup that period of compensation from future compensation.¹³ For these reasons, for compensation awarded for the period from September 10, 2004 to January 9, 2006, we conclude the balance of hardship tips in the favor of the appellant. We therefore grant the motion for a stay of the board's order directing payment of compensation in part for the period from September 10, 2004 to January 9, 2006.

The award of an attorney fee and costs is not stayed. We note that this may increase the amount of attorney fee compensation which the employee, if not successful on appeal, may be required to repay from future compensation,¹⁴ but we are

¹² *Alyeska Pipeline Service Co. v. DeShong*, 77 P.3d 1227, 1233 (Alaska 2003). We note that the Supreme Court cited with approval the Superior Court's opinion that "In construing the applicable workers' compensation statutes, the board must be guided by the admonition of the courts over the last 40 years that it has a duty to fully advise injured workers." As the Court noted, DeShong's physician's many reports were copied to the board. The delay in obtaining successful surgery was attributed to the employee's ignorance of her right to a timely referral; a delay the Court appears to have attributed, at least in part, to the board's inaction.

¹³ Even if the employee is awarded future compensation, the employee may be as reliant as he is now on that compensation for the expenses of daily life. The appellee's argument that substantial lump sums can be repaid from future compensation must be weighed against the wisdom of committing the employee's future support during retraining to repayment of an overpayment of compensation.

¹⁴ In *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d at 1067, the Supreme Court held that attorney fees were compensation "for the purposes of AS 23.30.155(j)."

unwilling to speculate on whether, if the board's award is upheld in part, the employee's attorney fee would be reduced by the board. Our statute clearly requires that decisions on stays be based on evidence presented to us, and no evidence was presented suggesting that the award was defective on its face or that portions of the award are related to any particular portion of the board's award of compensation. We note the board did not order statutory minimum fees on future compensation; therefore we need not address that issue.

Order.

The motion for stay is DENIED IN PART as to periodic payments of compensation from January 9, 2006 forward and as to compensation payable for the period from March 14, 2003 through September 9, 2004, and as to attorney fees and costs, and GRANTED IN PART as to the compensation payable for the period from September 10, 2004, through January 8, 2006. The form of the bond submitted is approved, but the appellant may substitute a new bond, in the same form, in an amount equal to 125 percent of the amount stayed. Our order is issued *nunc pro tunc* to January 30, 2006, the date of the hearing on the motion for stay, when we took the matter under deliberation.

Date: February 23, 2006

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed

John Giuchici, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

The Court did not limit the "purposes" of AS 23.30.155(j) to barring recoupment of overpaid attorney fees from the attorney. If an attorney fee is "compensation" for purposes of barring repayment by the attorney, instead of the employee, it is "compensation" for purposes of obtaining repayment from the employee, instead of the attorney, as well. *Croft* and AS 23.30.155(j) therefore limit, but do not bar, recovery of attorney's fees paid to an attorney from the employee.