

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GLINDA GARWOOD, (widow and personal representative for the Estate of Mark Garwood),	)	
	)	
Claimant,	)	INTERLOCUTORY DECISION AND
	)	ORDER ON RECONSIDERATION &
	)	MODIFICATION
	)	
v.	)	AWCB Case No. 201415369
	)	
BLACK GOLD EXPRESS,	)	AWCB Decision No. 15-0064
	)	
Employer,	)	Filed with AWCB Fairbanks, Alaska
and	)	on June 1, 2015
	)	
INSURANCE CO. OF THE STATE OF PENNSYLVANIA,	)	
	)	
	)	
Insurer,	)	
Defendants.	)	
	)	

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Glinda Garwood's (Claimant) March 27, 2015 petition for reconsideration was heard on the written record on May 7, 2015, in Fairbanks, Alaska, a date selected on April 20, 2015. Attorney John Franich represented Claimant. Attorney Colby Smith represented Black Gold Express and its workers' compensation insurer (Employer). As this was a written record hearing, there were no witnesses. *Garwood v. Black Gold Express*, AWCB Decision No. 15-0032 (March 17, 2015) (*Garwood I*) found Mark Garwood's death compensable and awarded attorney fees and costs. This decision addresses Claimant's petition for reconsideration of *Garwood I*'s fee award, and raises a new issue. The record closed at the hearing's conclusion on May 7, 2015.

ISSUE

Claimant contends the attorney fee hourly rate awarded in *Garwood I* should be reconsidered. She contends *Garwood I* overlooked the contingent nature of her lawyers' representation in this case and inappropriately reduced the requested hourly rates even though Employer did not object to those rates. Claimant seeks an order increasing attorney Beconovich's hourly rate to \$400 and attorney Franich's hourly rate to \$420.

Employer contends *Garwood I* properly reviewed and applied all legal requirements in its attorney fee award. It contends *Garwood I* already considered the contingent nature of Claimant's lawyers' representation. Therefore, Employer contends *Garwood I*'s attorney fee award should not be reconsidered.

**Should the attorney fee award in *Garwood I* be reconsidered or modified?**

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On March 17, 2015, *Garwood I* decided Mark Garwood's untimely death arose out of and in the course of his employment with Employer. As a result, *Garwood I* awarded Claimant's attorneys lump-sum and continuing attorney fees, and costs. *Garwood I* stated in this regard:

In making fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on behalf of the claimant, as well as the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys for services performed on issues for which the claimant prevails.

Claimant retained counsel who successfully obtained valuable benefits for her, namely a finding her husband died while in the course and scope of his employment with Employer and the benefits arising from that finding, including significant death benefits. Claimant incurred legal fees and is entitled to a fee and award under AS 23.30.145(b).

Claimant's counsel has specialized in the area of workers' compensation law for several years, and has represented employees at numerous hearings. He provided a verified attorney fee itemization billing 32.5 hours at \$420.00 per hour (Franich) and 1.9 hours at \$400.00 per hour (Beconovich), and a paralegal fee itemization

billing 12.2 hours at \$210.00 per hour, for a requested attorney fee award totaling \$16,972.00.

Employer has not objected to Claimant's counsel's hourly rate or contested his claimed expended hours. However, the board takes note Claimant's counsel's claimed rate is significantly higher than that of other attorneys representing injured workers in Alaska, including those who have done so for many decades. John Franich has previously been awarded attorney fees at the rate of \$350.00 per hour based on his level of experience representing claimants in work injury cases. *See, e.g., Bockus v. First Student Services*, AWCB Dec. No. 14-0040 (March 24, 2014); *Smith v. State of Alaska*, AWCB Decision No. 13-0037 (April 1, 2013); *Harris v. M-K Rivers*, AWCB Decision No. 13-0014 (January 28, 2013). Likewise, Bob Beconovich has been awarded attorney fees in the \$300.00-\$350.00 per hour range in recent cases. *See, e.g., Weed v. State of Alaska*, AWCB Decision No. 13-0154 (November 26, 2013)(R. Vollmer, dissenting, noting had the case been found compensable, fees would have been awarded at \$350.00 per hour); *Beeman v. Weaver Brothers, Inc.*, AWCB Decision No. 13-0101 (August 28, 2013); *Shastitko v. MTI*, AWCB Decision No. 13-0027 (March 19, 2013). Based on Employee's counsel's efforts and success in this case, their years of experience, the contingent nature of workers' compensation cases, and recent awards to them and to attorneys similarly situated, an hourly rate of \$350.00 for attorney time spent is reasonable here. Claimant's fee award will reflect this reduced rate. Claimant is entitled to an award of attorney's fees of \$12,040.00 and paralegal fees of \$2,562.00, for a total actual fee award of \$14,602.00 under AS 23.30.145(b). Claimant is also entitled to mandatory statutory minimum attorney fees under AS 23.30.145(a) when and if the statutory minimum amount based on the payment of past and future benefits exceeds the attorney fee awarded under AS § 145(b). *See, Porteleki. (Garwood I at 26-27).*

2) On March 27, 2015, Claimant filed a petition seeking reconsideration of *Garwood I*'s attorney fee award. Claimant's petition cited Alaska Supreme Court precedent concerning attorney fee awards in workers' compensation cases and argued *Garwood I* erred by not following the court's precedent and by awarding Claimant attorney fees at an hourly rate too low under the circumstances. Claimant contended *Garwood I* should have compared Claimant's lawyer's non-contingency hourly rate with his contingency rate. She also contended young attorneys are not entering the workers' compensation arena to represent injured workers or their beneficiaries because the contingent fees are not high enough. Claimant also cited to board decisions which she contends exemplified the need for high attorney fee awards to lawyers representing injured workers and their beneficiaries to ensure competent counsel are available to this litigant category. (Petition for Reconsideration, March 27, 2015).

3) On March 27, 2015, Claimant also filed an affidavit completed by attorney Bob Beconovich who conceded his fee in workers' compensation cases had previously been awarded at \$350 per hour. However, Beconovich averred beginning on January 1, 2014, the "increasingly chaotic legal environment surrounding the Board and Appeals Commission" as well as prevailing non-contingent fees in Fairbanks, Alaska, prompted him to increase his contingent hourly rate to \$400 per hour. Beconovich opined the board is "out of touch with local legal conditions in the private sector," and with the "extraordinary vagaries of workers' compensation litigation." Beconovich further noted the Alaska Workers' Compensation Appeals Commission recently awarded his hourly rate at \$400 and awarded Franich attorney fees at a \$420 hourly rate. Attorney Beconovich concluded it is "near impossible to support a business with a constant overhead in this environment." (Beconovich affidavit, March 27, 2015).

4) On April 13, 2015, Employer filed an opposition to the reconsideration petition. It argued *Garwood I* properly reviewed the applicable requirements for awarding attorney fees and made no error. Employer noted *Garwood I* awarded Claimant's counsel both a lump-sum and continuing attorney fee on all death benefits granted in *Garwood I*. Employer suggested legal precedent does not require a comparison between a non-contingent hourly fee rate and a contingent fee rate in these cases. Employer seeks an order denying Claimant's petition for reconsideration. (Opposition to Petition for Reconsideration, April 10, 2015).

5) On April 20, 2015, the parties appeared at a prehearing conference to discuss Claimant's petition for reconsideration. The prehearing conference summary reflects:

**Issues:**

Claimant's 3/27/15 Petition for Reconsideration of 3/17/15 D&O  
ER's 4/10/15 Opposition to Petition for Reconsideration

**Discussions:**

The parties agreed to set a written record hearing on Claimant's 3/27/15 Petition for Reconsideration. The parties agreed to a filing deadline for additional evidence of May 6, 2015.

**Action:**

**A written record hearing on Claimant's 3/27/15 Petition for Reconsideration is set for May 7, 2015. All written evidence upon which the parties wish to rely must be filed by May 6, 2015. The parties are requested to email their evidence and/or written briefs to nicole.hansen@alaska.gov, with hard copies to follow by mail.**

- 6) No order issued reconsidering *Garwood I* within 30 days of March 17, 2015. (Observations).
- 7) In response to the above-referenced prehearing conference summary, Claimant filed supplemental information supporting her reconsideration request. Among other things, Claimant obtained information from various Fairbanks, Alaska attorneys who did not practice in the workers' compensation area and found they billed from \$250 to \$450 per hour on non-contingent matters. She provided affidavits from William Satterburg who bills at \$300 per hour and Ward Merdes who bills at \$450 per hour. Claimant noted attorney Chancy Croft bills at \$400 per hour for his non-contingent role in mediating workers' compensation cases. Claimant's counsel averred he charges \$350 per hour for providing non-contingent legal services. Consequently, Claimant contended the requested \$400 per hour for co-counsel attorney Beconovich's services and \$420 per hour for attorney Franich's services are within the contingent hourly rates approved in other cases for similarly experienced workers' compensation counsel. Claimant's counsel emphasized his 20 years' experience practicing law in Fairbanks and more than 10 years continuously representing injured workers in workers' compensation cases. He contended this earns him "journeyman status" in his trade which translates into higher earnings. Claimant also reviewed attorney fees paid to other claimant counsel whom he opined are similar in experience to her attorneys. She noted the following hourly rates: Chancy Croft-\$400; Eric Croft \$300; Burt Mason-\$375; Bob Rehbock-\$425; Joseph Kalamarides-\$400. Furthermore, Claimant contended the above-mentioned hourly rates do not take into account the cost-of-living differential between Anchorage, where the above attorneys primarily practice, and Fairbanks. Lastly, Claimant contended Employer did not contest the hourly rates, but *Garwood I* chose to "look backward" to reduce the hourly rates, based upon previous awards. Claimant contended such behavior inappropriately dissuades new attorneys from entering the field on claimants' and their beneficiaries' behalf. Therefore, Claimant contended the board should reconsider *Garwood I* and award rates of \$400 per hour for co-counsel Beconovich and \$420 per hour for Franich. (Claimant's Supplemental Memorandum on Petition for Reconsideration, March 6, 2015).
- 8) A review of workers' compensation cases revealed the following hourly rates awarded to attorneys representing injured workers before the board in 2015: Joe Kalamarides-\$400; Elliot Dennis-\$330; Michael Jensen-\$385; Chancy Croft-\$400; Michael Stepovich-\$300; Burt Mason-\$375; John Franich-\$350. (ICERS database, accessed May 12, 2015).

PRINCIPLES OF LAW

**AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that

- 1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board’s “experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

**AS 23.30.110. Procedure on claims.** (a) Subject to the provisions of AS 23.30.105, a claim for compensation may be filed with the board in accordance with its regulations at any time after the first seven days of disability . . . and the board may hear and determine all questions in respect to the claim. . . .

The language “all questions” is limited to questions raised by the parties or the agency upon proper notice to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252, 256 (Alaska 1981).

**AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: “The plain import of this amendment [adding ‘mistake in a determination of fact’ as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” (*Quoting O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)). An examination of all previous

evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). AS 23.30.130 confers upon the board continuing jurisdiction over workers' compensation matters. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). By comparison and contrast, a petition for reconsideration has a 15 day time limit for the request and the board's power to reconsider "expires 30 days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." (*Id.* at n. 36).

**AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

**AS 44.62.540. Reconsideration.** (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 n. 36 (Alaska 2005).

**8 AAC 45.120. Evidence.**

. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

ANALYSIS

**Should the attorney fee award in *Garwood I* be reconsidered or modified?**

Claimant's timely petition seeks reconsideration of the attorney fee award in *Garwood I*, under AS 44.62.540. However, reconsideration authority expired on the thirtieth day after *Garwood I*

was issued, or on April 16, 2015. No action was taken on the petition within 30 days. Therefore, as a matter of law, the attorney fee award in *Garwood I* cannot be reconsidered. Claimant's March 27, 2015 petition for reconsideration is considered denied. *Lindekugel*. However, Claimant's pleadings may lend themselves to a possible *Garwood I* modification under AS 23.30.130; *Rodgers*. The panel, having reviewed Claimant's post-hearing pleadings, may decide on "its own initiative" to modify *Garwood I* on the attorney fee rate issue even though neither party requested modification. *Id.* Since Claimant has never requested modification, Employer has never addressed modification in its pleadings. AS 23.30.130 clearly allows the panel on its own initiative to modify *Garwood I*. But, the law also requires due process and an opportunity for Employer to be heard on the panel's initiative to review *Garwood I* for possible modification. AS 23.30.001(1); AS 23.30.110(a); AS 23.30.130; *Simon*. Therefore, to best ascertain the parties' rights, this decision will reopen the record and allow the parties 14 days from the date this decision is issued to provide optional briefing concerning modification. AS 23.30.135; 8 AAC 45.120(m). Specifically, the parties will be directed at their option to address the question: should *Garwood I* be modified to increase the hourly rate at which it awarded attorney's fees?

#### CONCLUSION OF LAW

The attorney's fee award in *Garwood I* will not be reconsidered but may be modified.

#### ORDER

- 1) Claimant's March 27, 2015 petition for reconsideration is considered denied under AS 44.62.540.
- 2) The record is reopened for 14 days from today's date and the parties are directed to provide optional briefing on the following question: should *Garwood I* be modified to increase the hourly rate at which it awarded attorney's fees?
- 3) If the parties elect not to submit additional briefing, the panel will decide on its own motion whether to modify *Garwood I* on the existing record.



Dated in Fairbanks, Alaska on June 1, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ \_\_\_\_\_  
Amanda Eklund, Designated Chair

/s/ \_\_\_\_\_  
Julie Duquette, Member

/s/ \_\_\_\_\_  
Jacob Howdeshell, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order on Reconsideration & Modification in the matter of Glinda Garwood, claimant v. Black Gold Express, Employer; Insurance Co. of the State of Pennsylvania, insurer / defendants; case no. 201415369; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on June 1, 2015.

/s/ \_\_\_\_\_  
Darren Lawson, Workers' Compensation Technician