ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

LEE O. STENSETH,	)	
Employee, Applicant	)	FINAL DECISION AND ORDER
	)	AWCB Case No. 199117984
v.	)	
	)	AWCB Decision No. 13-0109
MUNICIPALITY OF ANCHORAGE,	)	
Self-Insured Employer, Defendant.	)	Filed with AWCB Anchorage, Alaska on September 06, 2013

Lee Stenseth's March 30, 2013 claim for attorney fees was heard in Anchorage, Alaska on July 10, 2013, a date selected at the April 30, 2013 prehearing conference. Attorney Robert Rehbock represented Mr. Stenseth (Employee). Attorney Trena Heikes represented the Municipality of Anchorage (Employer). Employee appeared and testified. The record closed at the hearing's conclusion on July 10, 2013.

ISSUES

Employee contends Employer should be ordered to pay the attorney fees and costs he incurred after Employer breached the parties' settlement agreement. He also seeks to be relieved from a stipulation in which he agreed to pay his own attorney fees. Employer contends attorney fees may not be awarded because Employee has not filed a claim for benefits. Employer also contends there is no legal basis to set aside the stipulation on attorney fees.

1. Is Employee entitled to an award of costs and attorney fees incurred after Employer breached their settlement agreement?

2. Should Employee be granted relief from the attorney fees stipulation?

FINDINGS OF FACT

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

1. The findings of fact in *Stenseth v. Municipality of Anchorage*, AWCB Decision No. 13-0039 (April 11, 2013) (*Stenseth I*) are incorporated herein.
2. On June 15, 1991, Employee fell from heavy equipment while working for Employer and sustained an injury to his cervical spine. (Compromise and Release, August 23, 1996).
3. On August 23, 1996 a compromise and release agreement was approved in which Employee waived all benefits other than future medical benefits. (Compromise and Release, August 23, 1996).
4. Employee continued to be treated with prescription narcotic medication. (Stenseth Affidavit, May 15, 2012). Employee's last request to Employer for medical benefits, specifically prescription medication, was November 2006. (Stenseth Affidavit, May 15, 2012).
5. A police investigation in October and November 2006 revealed Employee had been using false identifications and forged prescriptions to obtain and sell prescription pain medications. The forged prescriptions were based on prescriptions Employee was given for treatment of his work injury. (Affidavit in Support of Complaint, November 8, 2010).
6. On April 23, 2012, Employer filed a petition alleging Employee had obtained workers' compensation benefits by making false statements or misrepresentations and seeking reimbursement of all benefits paid as a result of the misrepresentations. (Petition, April 23, 2012). The amount Employer has stated it was entitled to recover varied, but it has alleged the amount was as high as $176,000.00. (Observation, Undated Letter, Employer to P. Lisanske, Employee's Exhibit A2).
7. On October 4, 2012, Employee filed a petition requesting he be allowed to pay his attorney directly. (Petition, October 4, 2012).
8. Also on October 4, 2012, Employee's attorney filed an affidavit in support of Employee's petition. The affidavit states in part:

> 2. Pursuant to 23.30.145 there is no basis under the Act for attorney fees to be paid by Employer if Mr. Stenseth prevails against the [Employer's April 23, 2012] petition.

> 3. Therefore, Employee and the undersigned counsel seek an Order from the Board permitting Employee to pay his counsel's attorney fees.

9. On October 10, 2012, Employee signed a stipulation in support of the October 4 2012 petition stating in part:

> 2. On October 4, 2012, Employee, through his counsel filed a Petition for Board Order permitting Employee to pay Robert A. Rehbock attorney fees pursuant to 23.30.260 because there is no basis for attorney fees to be paid pursuant to 23.30.145 . . . .
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> 3. The parties agree pursuant to 23.30.260 that the Board should permit Mr. Stenseth to pay directly Robert A. Rehbock attorney fees because even if Mr. Stenseth prevails in the above claim, the Employer is not responsible to pay Mr. Stenseth's attorney fees as a part of his benefits because there is no basis for attorney fees to be paid pursuant to 23.30.145.
> . . . .
>
> 4. The parties have agreed to a mediation to be held on November 9, 2012 and if the parties do not resolve the matter through mediation, a hearing is scheduled for March 7, 2013.

Employee's attorney signed the stipulation on October 15, 2012, but for unknown reasons it was not signed by Employer's attorney until December 4, 2012, when it was filed with the board. (Stipulation, December 4, 2012).

10. On December 11, 2012, the board issued an order approving the attorney fee stipulation stating "Employee, Lee O. Stenseth, is permitted to pay his counsel of record, Robert A. Rehbock, attorney fees pursuant to 23.30.260. (Stipulation and Order for Award of Attorney Fees, December 11, 2012).
11. On December 18, 2012, Employee filed a petition seeking to dismiss Employer's April 23, 2012 petition for reimbursement on the grounds the parties had reached a binding settlement agreement following mediation and that Employer had subsequently breached the agreement. (Petition, December 18, 2012).
12. On March 6, 2013, Employee filed a claim seeking only attorney fees from Employer. (Claim, March 4, 2013).
13. On April 11, 2013, *Stenseth I* was issued dismissing Employer's April 23, 2012 petition, finding the parties had entered a binding settlement agreement as of December 11, 2012 under which Employee would pay Employer $30,000.00 and Employer would forego further recovery.

Employer breached that agreement about December 18, 2012, when it refused Employee's tender of funds. (*Stenseth I*).

14. On July 2, 2013, Employee filed an affidavit of attorney fees and costs incurred since December 17, 2012, detailing $63,257.95 in attorney fees and $1,660.45 in costs, for a total of $64,918.40. (Fee Affidavit, July 2, 2013).
15. At hearing, Employee testified he had not filed a claim for medical benefits, and had not asked Employer to pay for any benefits since 2007 when Employer controverted further medical care. (Employee).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.**
> It is the intent of the legislature that
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> (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;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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 23.30.008. Powers and duties of the commission.**
> (a) The commission shall be the exclusive and final authority for the hearing and determination of all questions of law and fact arising under this chapter in those matters that have been appealed to the commission, except for an appeal to the Alaska Supreme Court. The commission does not have jurisdiction in any case that does not arise under this chapter or in any criminal case. On any matter taken to the commission, the decision of the commission is final and conclusive, unless appealed to the Alaska Supreme Court, and shall stand in lieu of the order of the

> board from which the appeal was taken. Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent.
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> **AS 23.30.145. Attorney fees.**
> (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

The Alaska Supreme Court addressed AS 23.30.145 in *Wien Air Alaska v. Arant*, 592 P.2d 352, 365–66 (Alaska 1979) *overruled on other grounds, Fairbanks North Star School District. v. Crider*, 736 P.2d 770 (Alaska 1989) stating "AS 23.30.145 seeks to insure that attorney's fee awards in compensation cases are sufficient to compensate counsel for work performed. Otherwise, workers will have difficulty finding counsel willing to argue their claims." The policy behind AS 23.30.145(a) is that an employer is liable for attorney fees "because he created the employee's need for legal assistance." *Underwater Const., Inc. v. Shirley*, 884 P.2d 156, 159 (Alaska 1994), *quoting Haile v. Pan American World Airways, Inc.*, 505 P.2d 838, 842 (Alaska 1973) (Rabinowitz, J., dissenting in part, concurring in part).

The Alaska Supreme Court has stated that statutes must be interpreted according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as

well as the intent of the drafters. *Native Village of Elim v. State*, 990 P.2d 1, 5 (Alaska 1999). In *Thoeni v. Consumer Elec. Services*, 151 P.3d 1249, 1258 (Alaska 2007), the Supreme Court applied that precept to the Workers' Compensation Act. When interpreting AS 23.30.145(a), the Supreme Court has rejected an interpretation that would place form over substance. In *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978), the court rejected the argument that "controversion" meant only the written notice of controversion described in AS 23.30.155(a):

> To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance

The interpretation of various sections of the Act is often complicated by the fact the word "claim" is used in two different contexts. "There is a distinction between the employee's right to compensation (called 'the worker's claim for compensation') and the pleading which must be filed if benefits are controverted (called 'a claim')." *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995) citations omitted.

In *Walker v. Amso's Carpets & Interiors*, AWCB Decision No. 02-0183 (September 12, 2002) (decision on reconsideration), the employee filed a claim, and employer filed a petition under AS 23.30.250(b) to recover benefits obtained by fraud. The board denied both the employee's claim and employer's petition. Nevertheless, the board determined a petition to recover benefits under AS 23.30.250(b) petition "resists the payment of compensation" and awarded the employee attorney fees under AS 23.30.145(b) for successfully defending against the employer's petition.

Subsequent to the board's decision in *Walker*¸ the Supreme Court addressed AS 23.30.145 in *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 152 (Alaska 2007). In that case, the employer had resisted payment of benefits before the employee filed a claim, but in the employer's answer to employee's claim, it admitted liability. *Id.* at 152. The court held that "claim" in AS 23.30.145(a) refers to a written application for benefits, and to be liable for attorney's fees under AS 23.30.145(a), an employer must take some action in opposition to the employee's claim after the claim is filed. *Id.* The Court, however, awarded attorney fees under AS 23.30145(b) based on the resistance to paying benefits that occurred prior to employee's claim being filed. *Id.* at 153. The court stated two elements were required for an award of fees under AS 23.30.145(b): First, that the employer

"otherwise resisted" payment of benefits, and, second, that the claimant "employed an attorney in the successful prosecution of the claim." *Id.* The court did not say whether the word "claim" in AS 23.30.145(b) also referred to a written application for benefits or whether it meant an employee's right to compensation.

In *Municipality of Anchorage v. McKinney*, AWCAC Decision No. 058 (October 1, 2007), the commission addressed a situation in which a workers' compensation claim was found not to be compensable, but the claimant's attorney had performed work resulting in collateral benefits to the client. The Commission noted the only provision under which the board could order an employer to pay attorney fees was AS 23.30.145(a) or (b), and without making any distinction between subsections (a) and (b), stated that *Harnish* had construed the word "claim" in AS 23.30.145 to mean a written application for benefits. *Id.* at 4, 7.

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.**
> (a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180 , and may be punished as provided by AS 11.46.120 - 11.46.150.
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> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter. If a person fails to comply with an order of the board requiring reimbursement of compensation and payment of costs and attorney fees, the employer may declare the person in default and proceed to collect any sum due as provided under AS 23.30.170 (b) and (c).

AS 23.30.260. Penalty for receiving unapproved fees and soliciting.
(a) A person is guilty of a misdemeanor and, upon conviction, is punishable for each offense by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both, if the person

> (1) receives a fee, other consideration, or a gratuity on account of any services rendered for representation or advice with respect to a claim, unless the consideration or gratuity is approved by the board or the court;

8 AAC 45.050. Pleadings
. . . .

(f) Stipulations.

> (1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.
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> (2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.
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> (3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. A stipulation waiving an employee's right to benefits under the Act is not binding unless the stipulation is submitted in the form of an agreed settlement, conforms to AS 23.30.012 and 8 AAC 45.160, and is approved by the board.
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> (4) The board will, in its discretion, base its findings upon the facts as they appear from the evidence, or cause further evidence or testimony to be taken, or order an investigation into the matter as prescribed by the Act, any stipulation to the contrary notwithstanding.

ANALYSIS

1. Is Employee entitled to an award of costs and attorney fees incurred after Employer breached their settlement agreement?

This is a highly unusual case. Petitions to recover benefits obtained by misrepresentation are infrequent, particularly when brought years after the Employee last received benefits. And this

appears to be the only Alaska workers' compensation case involving breach of a settlement agreement.

The policy underlying the award of attorney fees stated by the Supreme Court in *Shirley* – that an employer is liable for fees if it created the employee's need for legal assistance – would seem to compel a ruling in Employee's favor. However, in *Harnish*, the Supreme Court stated that a claim (meaning a written application for benefits) is required before fees may be awarded under AS 23.30.145(a), and in *McKinney*, the Commission extended that requirement to AS 23.30.145(b).

Because Employee is seeking no further benefits from Employer, and has not sought any since 2007, he cannot file a claim for benefits. Although Employee's March 6, 2013 claim for attorney fees is a "claim"; it cannot support the award of attorney fees in the absence of a claim for other benefits. Under AS 23.30.145(a), fees are calculated as a percentage of other benefits awarded. Because Employee was not awarded other compensation, he cannot be awarded fees under subsection (a). Under AS 23.30.145(b), an employee may only be awarded fees after the successful prosecution of a claim. Where the only claim is only for attorney fees, the employee faces a logical conundrum in that he can only be awarded attorney fees after he was successful in seeking the award of attorney fees.

Reason, practicality, and common sense would suggest that if an employee is entitled to attorney fees to obtain benefits, he should be entitled to attorney fees if he successfully opposes an employer's efforts to recoup those same benefits. Here, the settlement agreement reached through the efforts of his attorney was a significant benefit to Employee; he was able to resolve Employer's demand for well over $100,000.00 for only $30,000.00. It is unlikely either the Supreme Court or the Commission had a situation such as this in mind when they held a written application for benefits was required for the award of attorney fees. Under AS 23.30.008, however, we are bound by the Commission decision in *McKinney*. Because Employee has not filed a "claim," meaning a written application for benefits, he is not entitled to attorney fees.

2. Should Employee be granted relief from the attorney fees stipulation?

Employer first contends there is no legal basis to relieve Employee from the December 4, 2012 fee stipulation. However, under 8 AAC 45.050(f)(3), the board can relieve a party from a stipulation for good cause. Employer's second contention is that an employee is not entitled to attorney fees for defending against an AS 23.30.250(b) petition, and Employer points to language in the stipulation and Employee's attorney's affidavit acknowledging that fact. Employer misapprehends Employee's argument. Employee contends his defense against Employer's petition ended when the parties reached a binding settlement agreement, which *Stenseth I* found to have occurred on December 11, 2012. Employee contends the fees and costs he has incurred since December 17, 2012, when Employer breached the agreement were not in defending against Employer's petition, but in trying to get Employer to abide by their settlement agreement, a different issue. Further, the references in the stipulation to mediation and hearing, suggest the parties' intent was that Employee's obligation for fees would end when the matter was resolved. It is unlikely that anyone contemplated Employer's breach of the settlement agreement or intended the agreement to apply in such a situation. To the extent the December 4, 2012 fee stipulation might apply to fees incurred after December 17, 2012, Employee has shown good cause for relief.

CONCLUSIONS OF LAW

1. Employee is not entitled to an award of costs and attorney fees incurred after Employer breached their settlement agreement.

2. Employee will be granted relief from the attorney fees stipulation.

ORDER

1. Employee's March 30, 2013 claim for attorney fees is denied.

2. Employee is relieved from the December 4, 2012 attorney fee stipulation for fees incurred after December 17, 2012.

Dated at Anchorage, Alaska on September 06, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

Amy Steele, Member

Patricia Vollendorf, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. If a request for reconsideration of this final decision is timely filed with the Board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 that the foregoing is a full, true and correct copy of the Decision and Order in the matter of LEE O. STENSETH employee/applicant; v. MUNICIPALITY OF ANCHORAGE, self-insured employer/defendant; Case No. 199117984; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties this 06 day of September 2013.

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Mariaanna Subeldia, Clerk