

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TRACY O. ATKINS, )  
Employee, )  
Claimant, ) FINAL DECISION AND ORDER  
v. )  
AWCB Case No. 200920434  
INLET TRANSPORTATION & TAXI )  
SERVICE, INC., ) AWCB Decision No. 14-0045  
Uninsured Employer, ) Filed with AWCB Anchorage, Alaska  
and ) on March 28, 2014  
WORKERS' COMPENSATION BENEFITS )  
GUARANTY FUND, )  
Defendants. )

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The Workers' Compensation Benefits Guaranty Fund's (Fund) December 2, 2013 petition to dismiss Tracy O. Atkins' (Employee) April 8, 2011 workers' compensation claim (claim) under AS 23.30.015(h) and AS 23.30.110(c) was heard on March 12, 2014 in Anchorage, Alaska, a date selected on February 14, 2014. Employee appeared, represented himself, and testified. The panel consisted of two members, a quorum under AS 23.30.005(f). Attorney Toby N. Steinberger appeared and represented the Fund. Witnesses included Joanne Pride and Penny Helgeson, who appeared in person; and Brian Altman, Velma Thomas and Stuart Cameron Rader, who appeared telephonically. The record closed at the hearing's conclusion on March 12, 2014.

## ISSUES

The Fund contends Employee's claim should be dismissed under AS 23.30.015(h) because Employee settled with a negligent third party without the Fund's written approval. Employee

admits he did not obtain authorization from the Fund but contends this should not be a basis for dismissal, because he acted on his attorney's advice.

***Should Employee's claim be dismissed under AS 23.30.015(h)?***

The Fund contends Employee's claim should be dismissed under AS 23.30.110(c) because Employee did not file an Affidavit of Readiness for Hearing (ARH) within two years after the Fund controverted all benefits. Employee contends his ARH should not be considered untimely, because he relied on procedural instructions from board designees.

***Should Employee's claim be dismissed under AS 23.30.110(c)?***

**FINDINGS OF FACT**

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

- 1) On September 6, 2009, while working as a taxi driver, Employee incurred multiple, serious injuries in a head-on motor vehicle accident caused by the other driver, Jeffrey Vincent, who died at the scene (Alaska Motor Vehicle Collision Report, reviewed March 26, 2010; Report of Occupational Injury or Illness, April 8, 2011.)
- 2) On January 25, 2010, attorney Joseph Kalamarides wrote Employee a letter declining to represent him, and stating:

If you file a workers' compensation report or [sic] injury or claim, you may need to know that any resolution with the liability carriers in the accident have [sic] to be done with the written agreement of the workers' compensation carrier as they may have a lien on those proceeds. AS 23.30.015. You need to get this permission even if they are contesting your right to have workers' compensation benefits (Kalamarides letter, January 25, 2010.)
- 3) On April 19, 2011, Employee filed a claim for temporary total disability, permanent partial impairment, medical and transportation costs, penalty and interest (claim, April 8, 2011; mistakenly dated April 8, 2009; observation.)
- 4) On May 5, 2011, Employee, represented by attorney Stuart Cameron Rader, released all claims with indemnity against the deceased tortfeasor, Jeffrey Vincent, and his father, Warren Vincent, for

a total of \$119,668.64. This amount included \$13,493.98 in attorney fees to Mr. Rader and \$6,174.66 in prejudgment interest (releases of claims regarding Jeffrey and Warren Vincent, May 5, 2011.)

5) On May 9, 2011, the Fund controverted all benefits on grounds unrelated to this hearing's disputed issues (Controversion Notice, filed May 11, 2011.)

6) At a prehearing conference on July 7, 2011, Employee was made aware of the May 9, 2011 controversion, and was warned that under AS 23.110(c), he needed to request a hearing within two years following the filing of a post-claim controversion notice, or his claim could be dismissed (Prehearing Conference Summary, July 7, 2011.)

7) At a prehearing conference on August 9, 2011, Employee was reminded of the May 9, 2011 controversion, and again advised his claim could be denied if he did not comply with the AS 23.30.110(c) two-year deadline (Prehearing Conference Summary, August 9, 2011.)

8) The summary from the October 20, 2011 prehearing conference included the same notice of the May 9, 2011 controversion, and boilerplate AS 23.30.110(c) warning language as the August 9, 2011 summary. (Prehearing Conference Summary, October 20, 2011.)

9) On October 21, 2011, the Fund controverted all benefits under AS 23.30.015 due to Employee's third-party settlements (Controversion Notice, filed October 24, 2011.)

10) On September 9, 2013, a board designee spoke telephonically with Employee and "advised [him] his deadline was coming up" (agency file, event details screen).

11) The summary from the October 14, 2013 prehearing conference stated:

There was some discussion as to what the applicable statute of limitations is in this case. Employee filed his claim on 4/8/2011 and it was controverted by the fund on 5/9/2011 and on 10/21/2011. Employee was in contact with division staff who on at least one occasion advised him his deadline was coming up after 5/9/2013. [Employee] stated he was advised by phone his deadline was 10/27/2013 by more than one WC staff member. Fund pointed out if [Employee] does not file an ARH by 10/27/2013, this becomes a moot point. Designee explained to [Employee] the Fund is saying he has to file his ARH by 10/27/2013 or his argument would have no merit (Prehearing Conference Summary, October 14, 2013).

12) On October 24, 2013, Employee filed an ARH on his April 8, 2011 claim (ARH, October 24, 2013).

13) On December 2, 2013, the Fund petitioned to dismiss Employee's claim under AS 23.30.015(h) for settling a third-party claim without the employer's written approval, and under AS 23.30.110(c)

for not filing an ARH within two years after the filing of the Fund's May 9, 2011 controversion (Petition to Dismiss, December 2, 2013).

14) On January 3, 2014, Employee wrote in response to the October 14, 2013 Prehearing Conference Summary:

IT STATES THAT, 'EMPLOYEE WAS IN CONTACT WITH DIVISION STAFF WHO ON AT LEAST ONE OCCASION ADVISED HIM HIS DEADLINE WAS COMING UP AFTER 5/9/2013'. I WOULD NOT BE CONCERNED BY THIS LINE OF TEXT, BUT WITH THE OPPOSING CONSUL BEING A STICKLER FOR DETAILS I THINK THAT IT IS IN MY BEST INTEREST TO ADDRESS THIS SO THAT IT IS ALSO A MATTER OF RECORD. WITH THAT SAID: I STRONGLY DISAGREE WITH THE STATEMENT REFERENCED IN THIS FIRST PARAGRAPH. I HAVE NOT BEEN ABLE TO FIND ANY SUPPORTING PAPER WORK TO SUBSTANTIATE THAT ALLEGATION. AS I STATED, I WAS TOLD ON MORE THAN ONE OCCASION THAT MY DEADLINE WAS 10/27/2013, BASED ON THE FACT THAT THE LAST CONVERSION DATE WAS 10/27/2011, AND THAT THE STATUE OF LIMITATIONS WAS TWO(2) YEARS FROM DATE OF LAST CONVERSION. THUS IS WHY I AM REQUESTING THAT 'DIVISION STAFF' AND/OR RECORDS BE PRODUCED, TO CORROBORATE THE ALLEGATION. OTHER WISE THIS ARGUMENT OF ME NOT FILING TIMELY IS MOST DEFINITELY, AND IRREFUTABLY, A MUTE POINT, AND I WOULD ASK THAT IT BE STRICKEN FROM THE RECORD, OR AT LEAST AMENDED TO BE A FACTUAL ACCOUNTING, SO AS NOT TO DELAY THESE PROCEEDINGS ANY LONGER (Employee e-mail, January 3, 2014; emphasis and typographical errors in original).

15) At hearing on March 12, 2014, the parties stipulated any benefits Employee was entitled to under the Alaska Workers' Compensation Act would exceed the \$100,000 (\$119,668.64 minus attorney fees and interest) Employee netted from the May 5, 2011 settlements with the Vincents' insurer (Atkins; Steinberger).

16) Mr. Rader testified he represented Employee in third-party liability settlements stemming from the September 6, 2009 automobile accident. Mr. Rader testified workers' compensation law was not his area of expertise, and he was unaware of the provisions of AS 23.30.015(h) at the time of Employee's settlements with the Vincents' insurer (Rader).

#### 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;

...

**AS 23.30.005. Alaska Workers' Compensation Board. . . .**

(h) The department shall adopt rules ... and shall adopt regulations to carry out the provisions of this chapter ... Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decisions not only on direct testimony 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*, 741 P.2d 528, 533-34 (Alaska 1987).

**AS 23.30.015. Compensation where third persons are liable.** (a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

...

(f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.

...

(h) If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

In *Forest v. Safeway Stores, Inc.*, 830 P.2d 778 (Alaska 1992), the Alaska Supreme Court (Supreme Court) held a workers' compensation carrier is entitled to a credit when a third party may be liable to pay damages for an employee's injury. The Supreme Court stated:

The clear purpose of this section is to allow employees to seek damages from third-party tortfeasors without jeopardizing their compensation while, at the same time, allowing employers to share in damage awards up to the limit of their exposure under workers' compensation law. *Id.* at 781-782.

*Larson v. Litwin Corp. et al.*, AWCB Decision No. 87-0036 (Feb. 3, 1987) analyzed AS 23.30.015 extensively, concluding the purpose of subsection (h) is to assure an employer's third-person reimbursement rights are protected against an employee's imprudent settlement. This was found consistent with the general principle an employer "needs to be protected from improvident dispositions of third-party rights by employees." *Id.* at 8, citing 2A A. Larson, *The Law of Workmen's Compensation*, Sec. 74.17, p. 14-406 (1988). A series of board decisions have ordered claims barred when an employee settled with a third-party without obtaining the employer's prior consent. *See, e.g., Morgan v. Morgan Chiropractic, Inc.*, AWCB Decision No. 06-0257 (September 20, 2006); *Villasin v. Huntleigh USA, Inc.*, AWCB Decision No. 06-0246 (September 6, 2006); *Blanas v. Kimco, et al.*, AWCB Decision No. 97-0169 (July 28, 1997); *Rainwater v. Pingo Corp.*, AWCB Decision No. 88-0368 (Dec. 23, 1988); and *Okpealuk v. Nana Regional Corp.*, AWCB Decision No. 88-0279 (Oct. 27, 1988).

**AS 23.30.082. Workers' compensation benefits guaranty fund. . . .**

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

. . .

(g) In this section, 'fund' means the workers' compensation benefits guaranty fund.

Although AS 23.030.082(c) does not specifically encompass uninsured employers, its provisions have been held applicable to insured and uninsured employers alike. In *Tucker v. Charles Hennager /Sunshine Services, Inc.*, AWCB Decision No. 07-0362 (November 30, 2009), an injured worker filed a claim against an uninsured employer and the Fund, and joined the parties and claims. Applying AS 23.030.082(c), *Tucker* held the Fund had standing to assert the same defenses as an insured employer. *Tucker* also concluded the Fund had to remain joined as a party, as one against whom a right to relief may exist.

Similarly, *Estes v. VFW South Anchorage Post #9981*, AWCB Decision No. 10-0132 (August 4, 2010), found the Fund is required under AS 23.30.082(c) to pay compensation and benefits due under the Act when an uninsured employer fails to do so. "The [Fund] is a creature of statute. The

payment of benefits due from the uninsured employer, but not paid, are potentially payable by the [Fund] only under the terms of AS 23.30.082(c).” *Id.*

**AS 23.30.110. Procedure on Claims. . . .**

(c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

AS 23.30.110(c) requires an employee to prosecute a claim in a timely manner. *Jonathan v. Doyon Drilling, Inc.*, 890 P.2d 1121, 1124 (Alaska 1995). The statute’s object is to bring a claim to the board for a decision quickly so the goals of speed and efficiency in board proceedings are met. *Providence Health System v. Hessel*, AWCAC Decision No. 131 (March 24, 2010).

The Supreme Court found the language of AS 23.30.110(c) clear, requiring an employee to request a hearing within two years of the controversion date or face claim dismissal. *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996). Though certain events may relieve an employee from strict compliance with the requirements of § 110(c), dismissal for failure to timely file an ARH is usually automatic and non-discretionary. *See, e.g., Hornbeck v. Interior Fuels*, AWCAC Dec. No. 08-0072 (Apr. 17, 2008); *Beaman v. Kiewit Construction*, AWCAC Decision No. 06-0101 (April 27, 2006).

The Supreme Court held the board owes a duty to every claimant to fully advise him of “all the real facts” bearing upon his right to compensation, and to instruct him on how to pursue that right under law. *Richard v. Fireman’s Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963). The board’s failure to correct an employer’s erroneous assertion to a *pro se* claimant that his claim was already time-barred rendered the claimant’s ARH timely. *Bohlmann v. Alaska Const. & Engineering*, 205 P.3d 316 (Alaska 2009). Applying *Richard*, *Bohlmann* held the board has a specific duty to inform

a *pro se* claimant how to preserve his claim under § 110(c). *Richard* is applied to excuse noncompliance with § 110(c) when the board failed to adequately inform a claimant of the two-year time limitation. *See, e.g., Dennis v. Champion Builders*, AWCB Decision No. 08-0151 (August 22, 2008).

### ANALYSIS

#### ***Should Employee's claim be dismissed under AS 23.30.015(h)?***

The parties agree Employee suffered a work-related injury and, without the Fund's written approval, settled lawsuits with the negligent third party who caused the injury. The parties also agree that if Employee were found eligible for benefits under the Act, the amount of compensation he would be entitled to would exceed the amount he netted from his settlements with the third party.

AS 23.30.015(h) bars an injured employee's claim if the employee settles a claim with a negligent third person without the employer's written consent, and the settlement amount is less than that the employer would have been required to pay. The Fund is authorized to assert the same defenses as an insured employer, and the provisions of AS 23.30.082(c) have long been construed to apply also to uninsured employers. *Tucker; Estes*.

It is regrettable Employee did not heed Mr. Kalamarides' advice regarding AS 23.30.015, and instead relied on Mr. Rader, who admittedly was unaware of the statute's provisions at the time he represented Employee. Nonetheless, the language of § 015(h) is clear and unequivocal. By operation of law, Employee is barred from further compensation benefits, and his claim will be dismissed. *Larson; Morgan; Villasin; Blanas; Rainwater; Okpealuk*.

#### ***Should Employee's claim be dismissed under AS 23.30.110(c)?***

Due to the conclusion reached above, there is no need to analyze this issue.



CONCLUSIONS OF LAW

- 1) Employee's claim will be dismissed under AS 23.30.015(h).
- 2) Employee's claim will not be dismissed under AS 23.30.110(c).

ORDER

- 1) The Fund's December 2, 2013 petition to dismiss Employee's April 8, 2011 claim under AS 23.30.015(h) is granted.
- 2) The Fund's December 2, 2013 petition to dismiss Employee's April 8, 2011 claim under AS 23.30.110(c) is denied as moot.

Dated in Anchorage, Alaska on March 28, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Margaret Scott, Designated Chair

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Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. 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 due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the 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 ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord with 8 AAC 45.150 and 8 AAC 45.050.

TRACY O. ATKINS v. INLET TRANSPORTATION & TAXI SERVICE, INC.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of TRACY O. ATKINS, employee / claimant; v. INLET TRANSPORTATION & TAXI SERVICE, INC., uninsured employer; and WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 200920434; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 28, 2014.

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Pamela Murray, Office Assistant