

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,)	
)	FINAL DECISION AND
v.)	ORDER ON MODIFICATION
)	
BLACK GOLD EXPRESS,)	AWCB Case No. 201415369
)	
Employer,)	AWCB Decision No. 15-0077
and)	
)	Filed with AWCB Fairbanks, Alaska
INSURANCE CO. OF THE STATE OF)	on July 2, 2015
PENNSYLVANIA,)	
)	
Insurer,)	
Defendants.)	
)	

Garwood v. Black Gold Express, AWCB Decision No. 15-0032 (March 17, 2015) (*Garwood I*) found Mark Garwood's death compensable and awarded attorney's fees and costs. 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. 15-0064 (June 1, 2015) (*Garwood II*) denied Claimant's petition for reconsideration as untimely but reopened the record for 14 days to allow the parties to brief whether or not *Garwood I* should be modified to increase the hourly rate at which awarded attorney's fees. On June 11, 2015, Claimant filed her supplemental briefing, supplemental attorney's fee affidavit and an attorney's fee affidavit and

supporting documents from attorney Eric Croft. Employer did not file a supplemental brief on the modification issue. The record closed 14 days after *Garwood II* issued, or on June 15, 2015.

ISSUE

On its own motion, *Garwood II* raised the question whether or not *Garwood I* should be modified to increase Claimant's hourly attorney's fee rate. In her supplemental briefing, Claimant contends *Garwood I* was "manifestly unreasonable," because it required Claimant's lawyer's billing rates to remain "stagnant" for 24 months. Claimant seeks an order increasing attorney Beconovich's hourly rate to \$400 and attorney Franich's hourly rate to \$420.

Employer did not file a supplemental hearing brief addressing modification. However, in its original opposition, Employer contended *Garwood I* properly reviewed and applied all legal requirements in its attorney fee award. It contended *Garwood I* already considered the contingent nature of Claimant's lawyers' representation. This decision assumes Employer, for the same reasons, contends *Garwood I*'s attorney fee award should not be modified.

Should the attorney fee award in *Garwood I* be 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*, AWCBC Dec. No. 14-0040 (March 24, 2014); *Smith v. State of Alaska*, AWCBC Decision No. 13-0037 (April 1, 2013); *Harris v. M-K Rivers*, AWCBC 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*, AWCBC 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.*, AWCBC Decision No. 13-0101 (August 28, 2013); *Shastitko v. MTI*, AWCBC 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).
- 9) On June 1, 2015, *Garwood II* denied Claimant's reconsideration request as untimely. However, *Garwood II* on its own motion invited the parties to file supplemental briefs by no later than June 15, 2015 addressing whether or not *Garwood I* should be modified to increase Claimant's lawyers' hourly attorney's fee rate. (*Garwood I* at 8).
- 10) On June 11, 2015, Claimant filed a supplemental brief addressing modification, a supplemental attorney's fee affidavit and an attorney's fee affidavit and supporting documents from attorney Eric Croft. (Claimant's Supplemental Briefing Regarding Modification, Supplemental Affidavit of Attorney Fees, and Affidavit of Eric Croft, June 11, 2015).
- 11) *Garwood II* did not leave the record open for parties to file additional evidence. (*Garwood I* at 8).
- 12) Employer did not file a supplemental brief regarding modification nor did it object to Claimant's brief, her supplemental attorney's fee affidavit, or attorney Croft's affidavit. (Observations).
- 13) The claimant's bar is aging, younger attorneys are not entering the workers' compensation field on the injured worker's side, and the local Fairbanks, Alaska claimant's bar is relatively limited in number. (Experience, judgment, observations and inferences drawn from the above).
- 14) Injured workers and beneficiaries with attorneys generally obtain claim resolution more quickly and efficiently, the results are fairer and indemnity and medical benefits are delivered to injured workers and their beneficiaries more predictably and at a more reasonable cost to employers. (*Id.*).

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 23.30.130. 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), which confers upon the board continuing jurisdiction over workers' compensation matters. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005).

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 in *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955 (Alaska 1982) stated the Act is “designed to provide the most efficient, dignified, and certain means of determining benefits for workers sustaining work-connected injuries.” *Whaley* further noted: “In particular, AS 23.30.145 is unique in its generosity to claimants and their counsel” (*id.* at 959). Attorney’s fees in workers’ compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). *Cortay* concluded:

Applying this analysis to the present case, the superior court erred in not awarding attorney’s fees with respect to Cortay’s attorney’s work on the prevailing medical issues at his actual rate of \$110 per hour. Awarding fees at half a lawyer’s actual rate is inconsistent with the purpose of awarding full attorney’s fees in the workers’ compensation scheme. If lawyers could only expect 50% compensation on issues on which they prevail, they will be less likely to take injured workers’ claims in the first place. (*Id.* at 109).

In *Childs v. Copper Valley Electric Ass’n*, 860 P.2d 1184, 1187 (Alaska 1993), the Alaska Supreme Court cited AS 23.30.145 and noted it provides “attorney’s fees in workers’ compensation cases should be *fully* compensatory and reasonable, in order that injured workers have competent counsel available to them.” (*Id.* at 1190-91; citations omitted; emphasis in original). In *Bustamante v. Alaska Workers' Compensation Board*, 59 P.3d 270 (Alaska 2002), the Alaska Supreme Court recognized, referring to the injured worker: “Without counsel, a litigant’s chance of success on a workers’ compensation claim may be decreased.” (*Id.* at 274).

8 AAC 45.120. Evidence.

. . . .

(m) The board will not consider evidence 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 modified?

At the earliest, the panel's authority to modify *Garwood I* expires on March 17, 2016. AS 23.30.130. *Garwood II* on its own motion determined Claimant's pleadings, which she filed to obtain reconsideration of *Garwood I*, may lend themselves to a possible *Garwood I* modification under AS 23.30.130. *Rodgers*. Thus, given this timeframe, the panel's authority to modify *Garwood I* has not yet expired. *Garwood II* directed the parties at their option to address the question: should *Garwood I* be modified to increase the hourly rate at which it awarded attorney's fees? Claimant filed a supplemental hearing brief and supporting documentation including additional evidence, Eric Croft's affidavit. Employer filed no hearing brief and no objections. Because *Garwood II* left the record open for additional briefing but not for additional evidence, attorney Croft's affidavit will not be considered. 8 AAC 45.120(m).

Claimant argues *Garwood I* should be modified to increase her lawyers' hourly attorney's fee rates. Claimant's main point in supplemental briefing is that her lawyers' hourly rates have remained "stagnant" for over two years. The panel has reviewed the record, including the parties' previous filings and arguments in support of, and objecting to, Claimant's request for a higher hourly attorney's fee rate. The panel is aware the claimant's bar is aging, and experience demonstrates few if any younger attorneys are entering the workers' compensation field on the injured worker's side. In Fairbanks, the claimant's bar is even more limited in number than it is statewide. All this makes it difficult for many injured workers and their beneficiaries to find competent counsel willing to represent them on a contingent basis. Experience shows in most instances if an injured worker or beneficiary has an attorney, the litigation process is usually quicker, more efficient, fairer, and results in more predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers. *Rogers & Babler; Bustamante*. In short, having competent counsel on both sides of a workers' compensation claim usually results in a better judicial process for all parties. AS 23.30.001(1).

Alaska Supreme Court precedent also clearly prefers that attorney's fee awards for lawyers representing injured workers be reasonable, fully compensatory and sufficient to encourage more, not less, participation on the claimant's side. *Whaley; Cortay; Childs*. Given the above, and upon further review and reflection on the original record, the panel has determined it made a factual mistake in *Garwood I*. The mistake was: *Garwood I* did not adequately compensate claimant's lawyers to encourage them and other attorneys in the local Fairbanks, Alaska area to represent injured workers and their beneficiaries in workers' compensation cases. This decision wants to encourage local Fairbanks attorneys in particular to represent injured workers and their beneficiaries in workers' compensation cases. Therefore, the hourly attorney's fee rate awarded in *Garwood I* will be modified, retroactively and prospectively. Attorneys Beconovich and Franich will be awarded attorney's fees in this case for all services rendered at \$400 per hour. There is no compelling reason to have a disparity between these two lawyers' hourly rates, and no evidence supporting any higher hourly rate. This hourly rate increase will compensate these two lawyers at the rate awarded to the most experienced workers' compensation claimant's counsel in Alaska.

CONCLUSION OF LAW

The attorney's fee award in *Garwood I* will be modified.

ORDER

- 1) Claimant's March 27, 2015 petition for reconsideration is denied pursuant to *Garwood II*, but modification of *Garwood I* on the panel's own motion under AS 23.30.130, is granted.
- 2) Attorneys Beconovich and Franich will be compensated at a \$400 per hour rate for their legal services in this case, retroactively and prospectively, in accordance with this decision.

Dated in Fairbanks, Alaska on July 2, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda Eklund, Designated Chair

/s/ _____
Julie Duquette, Member

/s/ _____
Jacob Howdeshell, Member

If compensation is payable under the terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation is awarded, but not paid within 30 days of this decision, the person to whom the compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 board 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 grounds 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 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 final Decision and Order on 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 by First-Class U.S. Mail, postage prepaid, on July 2, 2015.

/s/ _____
Darren Lawson, Workers' Compensation Technician