

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

AKEN A. DUOR,)
)
Employee,)
Claimant,) INTERLOCUTORY
) DECISION AND ORDER
v.)
) AWCB Case No. 201808132
PETER PAN SEAFOODS, INC.,)
) AWCB Decision No. 19-0082
Employer,)
and) Filed with AWCB Anchorage, Alaska
) On August 7, 2019.
TOKIO MARINE AMERICA)
INSURANCE COMPANY,)
)
Insurer,)
Defendants.)

Aken A. Duor's (Employee) January 30, 2019 claim was heard on July 10, 2019, in Anchorage, Alaska, a date selected on April 23, 2019. Employee's March 27, 2019 hearing request gave rise to this hearing. Attorney John Franich appeared telephonically and represented Employee, who appeared telephonically and testified. Attorney Jeffrey Holloway appeared and represented Employer. Erin Havard, the insurance adjuster, appeared and testified for Employer. The record closed at the hearing's conclusion on July 10, 2019.

ISSUE

Employee contends his lawyer provided valuable services in obtaining his temporary total disability (TTD) benefit rate adjustment. Employer contends no benefit beyond what Employer has already paid was secured by Employee's lawyer.

Is Employee entitled to attorney's fees and costs?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) Employee began working for Employer in 2014. Employee's work for Employer was seasonal in nature. (Employee brief, July 3, 2019; Employer's hearing evidence, June 20, 2019, p. 10).
- 2) On June 7, 2018, Employee injured his spine, head, and vision, while working for Employer as a foreman. (Employer brief, July 2, 2019).
- 3) Before his June 7, 2018 injury, Employee had kept the physical copies of his earnings records in a bag at Trident Seafoods' (Trident) facility in Alaska. Its whereabouts is presently unknown. (Employee).
- 4) Employer hired Daniel Alsdorf, R.N., for assistance in acquiring Employee's information. Alsdorf asked Employee to provide wage information for 2016 and 2017. Due to his poor health, Employee told Joseph Owusu, his tax preparer, to provide his information directly to Alsdorf. (Employee; Employee brief, July 3, 2019).
- 5) On June 11, 2018, Havard obtained Employee's gross earnings for 2016 and 2017 from Employer, \$8,135.23 in 2016 and \$18,374.64 in 2017. From June 8, 2018, through January 31, 2019, Employer paid Employee temporary total disability (TTD) benefits at the rate of \$266.00 per week based on his 2017 gross earnings of \$18,374.00 with Employer. (Employer brief, July 2, 2019, Exhibit 2; Employer's hearing evidence, June 20, 2019, p. 10).
- 6) On June 18, 2018, Employee provided a copy of his 2016 tax return to Employer at its request. The return stated it was "self-prepared" using TurboTax software. Employer recalculated Employee's TTD rate based on his adjusted gross income of \$18,637.00, which was close to his 2017 gross earnings of \$18,374.00 with Employer. The recalculated TTD benefit rate remained the same at \$266.00 per week. (Havard; Employer brief, July 2, 2019; Employer's hearing evidence, June 20, 2019, pp. 13-37).
- 7) At hearing, Havard testified he reviewed Employee's reemployment evaluation report, which did not disclose "at any point and time" Employee worked for Trident or Safeway Inc. (Safeway) in 2016 or 2017. In contrast to his testimony, the report states from 2014 through June 2018, Employee worked seasonally for Employer from April to August, for Trident from December to

April, and for Safeway from December to April. (Havard; Linda Ferra, C.R.C., report, November 13, 2019).

8) On January 30, 2019, Robert Bechonovich with The Franich Law Office entered his appearance on behalf of Employee. (Entry of Appearance, January 30, 2019).

9) Also on January 30, 2019, Employee claimed TTD, compensation rate adjustment, attorney fees and costs, interest and penalty. He attached W-2 forms to the claim, which showed he earned a total amount of \$39,752.57 in wages in 2017, \$16,633.20 from Employer, \$13,288.93 from Trident, and \$9,830.44 from Safeway. Employer saw these documents for the first time when they were served with the claim. (Workers' Compensation Claim, January 30, 2019; Havard).

10) Employee did not offer evidence to show he has ever provided the W-2 forms attached to the January 30, 2019 claim to Employer before the claim date. (Observation).

11) At hearing, Havard testified he had not seen Employee's 2017 W-2 forms from Trident or Safeway before he was served with the January 30, 2019 claim. (Havard).

12) On February 14, 2019, Employer adjusted TTD benefit rate to \$528.37 per week retroactive to June 8, 2018, based on the 2017 W-2 forms attached to the January 30, 2019 claim. It also paid interest on underpaid TTD benefits. (Employer brief, July 2, 2019, Exhibit 1).

13) On February 19, 2019, Employer admitted TTD, compensation rate adjustment, and interest, but denied penalty and attorney fees and costs. (Answer, February 19, 2019).

14) On March 27, 2019, Employee requested a hearing on the issue of attorney fees and costs. (Affidavit of Readiness for Hearing, March 27, 2019).

15) On April 23, 2019, the parties confirmed the compensation rate was adjusted, and the most issues contained in the January 31, 2019 claim have been resolved. They stipulated to an oral hearing on attorney fees and costs issue only. (Prehearing Conference Summary, April 23, 2019; Employee brief, July 3, 2019).

16) From June 7, 2018, to January 30, 2019, Employer did not controvert Employee's medical benefits. (ICERS).

17) On July 3, 2019, Employee requested a total of \$5,400.00 in attorney fees, \$2,680.00 for services attorney Robert Beconovich provided and \$2,720.00 for services attorney John Franich provided. (Affidavit of Counsel, July 3, 2019).

PRINCIPLES OF LAW

The board may base its decision on not only 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 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

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. . . . 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. . . . 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.

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers can find and retain competent counsel. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990). In *State v. Cowgill*, 115 P.3d 522 (Alaska 2005), the board ruled in Cowgill's favor on her controverted claim (*Cowgill v. State*, AWCBC Decision No. 00-0147 (July 18, 2000) at 8). The state appealed, and the superior court reversed. On remand, the *Cowgill* board reviewed

its past decisions and came to a similar result. The state appealed again, eventually taking the case to the Alaska Supreme Court. The court in *Cowgill* explained what constitutes adequate board findings to support an attorney's fee award:

The board explained that the claim was vigorously litigated by very competent counsel. The range of litigated benefits to the employees was significant. . . . [W]e find the medical evidence was fairly complex. Last, we find the employer raised unique arguments regarding attorney's fees, not previously decided. (*Cowgill*, 115 P.3d 522 at 526).

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184 (1993), CVEA controverted Childs's compensation in November 1988, and Childs had to file a claim to recover these benefits. Subsequently, CVEA voluntarily paid benefits for the period from October 1988 through April 1989. In addition, CVEA delayed payment of TTD benefits that were due until August 1990. The Supreme Court held Childs was entitled to attorney's fees because CVEA's payment, though voluntary, is the equivalent of a Board award, because the efforts of Childs's counsel were instrumental to inducing CVEA to pay the benefits.

AS 23.30.155. Payment of compensation. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice. . . .

(b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.

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(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

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(p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

In *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187 (Alaska 1984), the Supreme Court held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it should have been paid.

AS 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.220. Determination of spendable weekly wage. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

. . . .

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

3 AAC 26.100. Additional standards for prompt, fair, and equitable settlements of workers' compensation claims. Any person transacting a business of insurance who participates in the investigation, adjustment, negotiation, or settlement of a workers' compensation claim:

(1) may not require a claimant to travel unreasonably for medical care, rehabilitation services, or any other purpose;

(2) shall provide necessary claim forms, written instructions, and assistance that is reasonable so that any claimant not represented by an attorney is able to comply with the law and reasonable claims handling requirements;

(3) shall promptly make all payments or denials of payments as required by statute or regulation.

In *Seybert v. Comico Alaska Exploration*, 182 P.3d 1079 (Alaska 2008), the Supreme Court held the workers' compensation system is an adversarial system, and there is no fiduciary relationship

between a claimant and an insurer. Although 3 AAC 26.100 imposes some duties on a workers' compensation insurer, it does not impose a fiduciary relationship. The regulation requires an insurer to provide a claimant with "assistance that is reasonable" so an unrepresented claimant can "comply with the law and reasonable claims handling requirements." It also prohibits an insurer from requiring a claimant to "travel unreasonably for medical care, rehabilitation services, or any other purpose." These requirements do not impose duties of loyalty and the disavowal of self-interest that are hallmarks of a fiduciary's role.

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;

8 AAC 45.180. Costs and attorney's fees. . . .

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(b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

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(d) The board will award a fee under AS 23.30.145 (b) only to an attorney licensed to practice law under the laws of this or another state. (1) A request for a fee under AS 23.30.145 (b) must be verified by an affidavit itemizing the hours expended as

well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145 (a), if AS 23.30.145 (a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section. (2) In awarding a reasonable fee under AS 23.30.145 (b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

8 AAC 45.210. Weekly compensation rate. . . .

. . . .

(d) An employer may reduce the employee's weekly compensation rate to a rate equal to the employee's spendable weekly wages and to a rate less than \$154 for an injury that occurred before July 1, 2000, or to a rate less than 22 percent of the maximum compensation rate under AS 23.30.175(a) for an injury that occurred on or after July 1, 2000, without a board order if

(1) AS 23.30.220(a)(1) is the appropriate method to use in determining the employee's gross weekly earnings;

(2) the employee does not submit any wage documents, or the employee submits wage documents that entitle the employee to less than \$154 for an injury that occurred before July 1, 2000, or to a rate less than 22 percent of the maximum compensation rate under AS 23.30.175(a) for an injury that occurred on or after July 1, 2000;

(3) the employer obtains copies of the employee's wage documents or other written proof of the employee's wages for the two years before the year of the employee's injury, and submits copies of the written proof with the compensation report filed under AS 23.30.155(c); and

(4) the employer files an affidavit stating that the written proof submitted under (3) of this subsection represents all of the employee's wages that could be obtained after reasonable inquiry and with due diligence, and that the employee has not been absent from the labor market for 18 or more months in the past two years.

ANALYSIS

Is Employee entitled to attorney fees and costs?

Employee contends the rate of his TTD benefits was erroneous from the inception of the claim, and but for his attorney's efforts in preparing the claim, Employer would have not increased it. Employee requests attorney fees and costs. AS 23.30.145(a), (b); 8 AAC 45.180. The Alaska Supreme Court encourages fully compensatory and reasonable attorney fees so injured workers can find and retain competent counsel. *Cortay*. A claimant's attorney is entitled to reasonable fees based on the nature, length, complexity of the services performed, transportation charges, and the benefits resulting from those services. AS 23.30.145(a); *Cowgill*. However, fees are awarded only for claims prevailed upon. AS 23.30.145(b).

Employee contends Employer knew or should have known his 2017 income information was incomplete because it had not received his 2017 tax return. Also, as he is a seasonal worker, it should have known he works for more than one employer in any given year. Therefore, Employer had an affirmative duty to inquire about Employee's other sources of income, not just what he had earned from Employer in that year, and pay the appropriate TTD rate. Nonetheless, if Employee wished to get benefits at higher rather than lower rates, he should have submitted proper wage documents to support his request. AAC 45.210(d)(2). Havard testified Employer had not seen the 2017 W-2 forms showing a total amount of \$39,752.57 in wages until it was served with the claim; Employee did not offer any evidence to the contrary. AS 23.30.122; *Smith*. Further, Employer owes no fiduciary duty to Employee; it only has a duty to provide Employee with "assistance that is reasonable" so an unrepresented claimant can "comply with the law and reasonable claims handling requirements." *Seybert*. Here, Employer provided reasonable assistance to Employee: it did not require Employee to travel unreasonably for medical care; it hired Alsdorf to assist Employee to obtaining necessary documentation to process his benefits; and, it promptly made all payments, including interest. AS 23.30.155(p); AAC 26.100; AAC 45.142(b)(1); *Rawls*.

Initially, Employer reasonably calculated and paid Employee TTD benefits at the rate of \$266.00 per week based on his 2017 gross earnings of \$18,374.00 with Employer. AS 23.30.220(a)(4); AS 23.30.155; AS 23.30.185. Then, when it obtained Employee's 2016 tax return, it recalculated the

rate based on the adjusted gross income of \$18,637.00, which remained the same at \$266.00 per week. *Id.* Due to the similarity of these two figures, it was reasonable to assume Employee only worked for Employer in 2017. *Rogers & Babler*. However, Employee's 2017 W-2 forms attached to the claim showed he earned a total amount of \$39,752.57 in wages in 2017: \$16,633.20 from Employer, \$13,288.93 from Trident, and \$9,830.44 from Safeway. In any event, Employer did not dispute the newly provided information; it timely readjusted the TTD benefit rate and paid interest on underpaid TTD benefits. AS 23.30.220(a)(4); AS 23.30.155; AS 23.30.185; *Rawls*. Also, Employer actively sought Employee's earnings information. It hired Alsdorf to obtain it; Alsdorf communicated with Owusu, Employee's tax preparer, to obtain necessary documentation to process the claim. In short, there was no controversion, failure to pay benefits, and/or resistance to pay benefits by Employer; consequently, there was no claim to prevail upon. AS 23.30.145(a),(b); AAC 26.100; AAC 45.142(b)(1).

This is neither a complex nor vigorously litigated case; there is no dispute involving complex medical questions or expert opinions. *Cowgill; Rogers & Babler*. There has not been significant litigated benefit in this case as Employer timely paid TTD and medical benefits. AS 23.30.155; *Id.* When Employee filed a claim for TTD benefits, compensation adjustment and interest, Employer admitted those claims; it only denied attorney fees, interest and penalty. In short, there is no evidence supporting the efforts of Employee's attorney were instrumental to inducing Employer to increase his TTD benefit rate. *Childs*

CONCLUSION OF LAW

Employee is not entitled to attorney fees and costs.

ORDER

Employee's request for attorney fees and costs shall be denied.

Dated in Anchorage, Alaska on August 7, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Rick Traini, Member

/s/
Kimberly Ziegler, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 in the matter of AKEN A. DUOR, employee / claimant v. PETER PAN SEAFOODS, INC., employer; TOKIO MARINE AMERICA INSURANCE COMPANY, insurer / defendants; Case No. 201808132; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on August 7, 2019.

/s/
Nenita Farmer, Office Assistant