Alaska Workers' Compensation Appeals Commission

Harnish Group, Inc., d/b/a N-C Machinery Company, and Alaska National Insurance Company,
Appellants,

vs.

Jerry D. Moore,
Appellee.

Final Decision
Decision No. 095 December 24, 2008

AWCAC Appeal No. 08-010
AWCB Decision No. 08-0033
AWCB Case No. 200112089

Appeal from Alaska Workers' Compensation Board Decision No. 08-0033, issued on February 26, 2008 by northern panel members William Walters, Chair, and Damian J. Thomas, Member for Labor.

Appearances: Richard L. Wagg, Russell Wagg Gabbert and Budzinski, for appellants Harnish Group, Inc., and Alaska National Insurance Co. Robert M. Beconovich, Law Offices of Robert M. Beconovich, for appellee Jerry D. Moore.

Proceedings: Appeal filed March 25, 2008. Notice of right to request dismissal on jurisdictional grounds issued March 26, 2008. Oral argument on appeal presented September 16, 2008.

Commissioners: David Richards, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

This is an appeal of the board's award of an attorney fee of $10,000 under AS 23.30.145(b) on the grounds that it is unsupported by substantial evidence. The appellants also argue that the board erred by excusing appellee's counsel's non-compliance with 8 AAC 45.180(d). The appellee made a limited response to the appeal, challenging the commission's jurisdiction because the board's award was made on remand from the Supreme Court; however, at oral argument he also contended that the board's award was fair.

The parties' contentions require the commission to decide if it has jurisdiction to consider the appeal in light of our decisions in *Wolf Dental Servs., Inc., v. Wolf*[1] and other cases.[2] The commission concludes that, because no explicit or implicit jurisdiction was retained by the Superior Court, and because the exercise of our jurisdiction will not interfere with the exercise of the Supreme Court's jurisdiction, the commission may consider this appeal.

The parties' contentions also require the commission to consider whether the board had substantial evidence in the record to support an award of an attorney fee of $10,000 under AS 23.30.145(b). The commission concludes that the board did not have such evidence. The commission also concludes the appellee's counsel did not establish good cause for excuse from 8 AAC 45.180(d). The commission vacates the board's decision and remands the case to the board for rehearing.

1. Factual background and proceedings.

Jerry Moore injured his back while picking up a battery in 2001. His employer's insurer paid compensation and medical benefits. After he had surgery, the insurer asked that the reemployment administrator determine if Moore was eligible for reemployment benefits in June 2002.[3] The administrator found Moore eligible for benefits,[4] and Moore accepted the benefits.[5] Moore's reemployment provider conducted testing, but progress on reemployment plan development was slow,

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[1] *Wolf Dental Servs.*, *Inc., v. Wolf*, Alaska Workers' Comp. App. Comm'n Dec. No. 031 (Feb. 2, 2007).

[2] *Pietro v. Unocal Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 082 (June 26, 2008); *Thoeni v. Consumer Elec. Servs.*, Alaska Workers' Comp. App. Comm'n Dec. No. 039 (Apr. 30, 2007); *Doyon Drilling, Inc. v. Whitaker,* Alaska Workers' Comp. App. Comm'n Dec. No. 006 (Mar. 2, 2006).

[3] R. 000100.

[4] R. 000143-44.

[5] R. 000145.

especially after Moore was injured in a car accident unrelated to his employment.[6] Sometime in January or February 2003, Beconovich was hired to represent Jerry Moore.

The employer's insurer worked with Moore and Moore's reemployment benefits provider to develop a plan to retrain as a check cashier because on the job training as a hardware salesperson proved too strenuous.[7] On January 21, 2004, the insurer's adjuster told the provider that the insurer was converting Moore's benefits to permanent total disability.[8] On January 23, 2004, the adjuster changed the payment code and amount to permanent total disability compensation.[9] The reemployment provider met with Moore and his wife regarding a plan on January 27, 2004, and gave them the plan draft.[10] January 27, 2004, the employee's attorney, Robert Beconovich, filed an entry of appearance.[11] The adjuster signed the reemployment plan on January 28, 2004.[12]

a. Board proceedings.

Beconovich completed a workers' compensation claim form for Moore on January 26, 2004, and filed it on February 10, 2004.[13] On February 10, 2004, the employer's attorney mailed an answer admitting liability for permanent total disability compensation but denying liability for an attorney fee; the answer was received at the Fairbanks office of the board on February 12, 2004, by facsimile[14] and then by mail on February 17, 2004.[15] Reemployment planning ceased February 12, 2004, when the

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6 R. 000168, 000170.

7 R. 000244.

8 Hrg Tr. 20:22 – 21:1 (Aug. 26, 2004).

9 Hrg Tr. 26:11-14, R. 000011.

10 R. 000245.

11 R. 00013. It was signed by the attorney January 23, 2008.

12 R. 000250.

13 R. 000014-15.

14 R. 000255-56.

15 R. 000018-19.

employee's attorney notified the providers that the employer agreed to pay permanent total disability compensation.[16]

The parties met in a prehearing conference on May 27, 2004. The summary says that the employer's position is "Answer of 2/10/2004, admit PTD, deny atty fees."[17] The parties agreed to a hearing "on the issue of atty fees and agreed to an oral hearing on August 26, 2004." The employee's attorney did not file a fee affidavit. At the hearing, the only issue presented was whether the employer was required to pay an attorney fee. Ryan Leveque, the insurer's adjuster, and Lori Moore, Moore's wife, testified.

The board awarded a fee based on AS 23.30.145(a). The board wrote: "We find the PTD benefits secured by the employee are of greater value that the reemployment benefits previously being paid. We find the employee's attorney provided valuable services in the securing of the PTD benefits. Consequently, we can award fees and costs under AS 23.30.145."[18] After citing AS 23.30.145(a) and *Wise Mechanical Contractors v. Bignell,*[19] the board stated:

> Having considered the nature, length, and complexity of the services performed, the resistance of the employer, as well as the benefits resulting from the services obtained, we find the claimed minimum statutory fees are reasonable for the successful prosecution of this claim.[20] Accordingly, we will award the employee statutory minimum attorney fees under AS 23.30.145(a) on all additional benefits paid to the employee retroactive as PTD benefits on or about January 23, 2004, and on all PTD benefits paid to the employee thereafter, and continuing.[21]

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16 R. 000252.

17 R. 000097.

18 *Jerry D. Moore v. N C Machinery,* Alaska Workers' Comp. Bd. Dec. No. 04-0207, 7 (Aug. 27, 2004) (W. Walters, Chair).

19 718 P.2d 971, 974-75 (Alaska 1986).

20 *Thompson v. Alyeska Pipeline Service Co.*, Alaska Workers' Comp. Bd. Dec. No. 98-0315 (Dec. 14, 1998).

21 *Jerry D. Moore,* Bd. Dec. No. 04-0207 at 7 (footnote included).

The employer and insurer sought reconsideration on the grounds that the board had erred in identifying the issue, and that an award under AS 23.30.145(a) could not be made where no controversion was filed. The board, on reconsideration, found that the employer's insurer's resistance constituted a "controversion in fact" and that the employer's insurer would not have provided permanent total disability benefits "but for the representation . . . by Mr. Beconovich" who "played a significant, if not decisive, role in precipitating and preserving the employee's entitlement to PTD benefits."[22] The board confirmed its award of fees under AS 23.30.145(a).[23] The employer and its insurer appealed.

b. Court proceedings and remand.

The superior court affirmed the board's award.[24] Judge Torresi concluded that the contentions of the parties "seem plainly factual."[25] Judge Torresi commented that "the delay and the closeness in time of the attorney's acts to the ultimate decision [to cease reemployment efforts] persuade me that the board's actions were reasonable."[26] Citing the Supreme Court's decision in *Alaska Interstate v. Houston*,[27] Judge Torresi said:

> Bright line tests are always easier to implement, and this appeal suggests that there is at least one reason for requiring a formal notice of controversion as a prerequisite to an award of statutory minimum fees. But that is not the law, and the board's findings reject the employer's argument that Mr. Moore's lawyer did absolutely nothing except lurk in the background, hiding in the shadows. I conclude that the findings are supported by

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[22] *Jerry D. Moore v. N C Machinery*, Alaska Workers' Comp. Bd. Dec. No. 04-0229, 13 (Sept. 24, 2004) (W. Walters, Chair).

[23] *Id*.

[24] *Harnish Group Inc. v. Moore*, Decision on Appeal, 3AN-04-12249-CI (Alaska Super. Ct., Feb. 1, 2006); R. 0459-71.

[25] *Harnish Group Inc. v. Moore*, Decision on Appeal, 6, 3AN-04-12249-CI (Feb. 1, 2006); R. 0464.

[26] *Id.* at 12; R. 0470.

[27] 586 P.2d 618, 620 (Alaska 1978).

> substantial evidence, and, for the reasons set forth in this memorandum, affirm the decision of the board.[28]

The employer appealed. The Supreme Court reversed, holding that the board erred in awarding fees under AS 23.30.145(a) where there was no controversion of the claim, in fact or in law.[29] The court observed that "the actions that the Board identified as showing NC Machinery's resistance to paying Moore PTD benefits occurred before Moore filed a workers' compensation claim" and that "the actions that the Board identified as resistance cannot serve as the basis for a controversion in fact of Moore's claim because Moore's claim had not been filed when the actions occurred."[30]

However, the Supreme Court found the board's factual findings regarding resistance to paying permanent total disability compensation by continuing in a seemingly futile reemployment planning process could support an award of fees under AS 23.30.145(b).[31] It remanded the case to the board for an award under AS 23.30.145(b) because "the board's findings that [the employer] resisted payment of benefits and that Moore's attorney played a significant role in his receipt of benefits are supported by substantial evidence."[32] The Supreme Court's remand states: "For the foregoing reasons, we REVERSE the superior court's decision affirming the Board and REMAND the case to the Board for a determination of what reasonable fees are due under AS 23.30.145(b)."[33]

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[28] *Harnish Group, Inc. v. Moore*, Decision on Appeal at 12 (citations omitted); R. 0470.

[29] *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007).

[30] *Id.* at 152.

[31] *Id.* at 152-53.

[32] *Id.* at 147.

[33] *Id.* at 154.

c. The board's decision following remand.

The board held a hearing on January 31, 2008, on the issue of an attorney fee award under AS 23.30.145(b).[34] It issued a decision awarding a fee of $10,000.[35] After seven pages quoting the prior board decisions, the board summarized the Supreme Court's holding as follows:

> In *Harnish Group, Inc., et al. v. Moore*, the Alaska Supreme Court held that the employer resisted the employee's benefits *before* he filed a Workers' Compensation Claim, and therefore we erred in applying AS 23.30.145(a). The Court affirmed our findings that the employer resisted the employee's benefits, and the employee retained an attorney and incurred legal costs in the successful prosecution of his claim. The Court held that the employee was entitled to reasonable attorney fees under AS 23.30.145(b), and remanded the case to our attention.[36]

The board then summarized Beconovich's statements in the January 31, 2008, hearing as follows:

> He indicated the employee's files were scanned and shredded some time ago, and that the hourly billing records were destroyed. He indicated he has used several different billing and hour-keeping systems since 2004. He asserted the claim file was a milk carton crate. He indicated he met with the employee dozens of time, [sic] and met frequently with the employee's rehabilitation specialist. He asserted that he believes his fees for a case of this complexity would normally be between $7,500.00 and $12,000.00. He noted we rarely award more that $10,000.00.[37]

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[34] *Jerry D. Moore v. N. C. Machinery,* Alaska Workers' Comp. Bd. Dec. No. 08-0033, 1 (Feb. 26, 2008) (W. Walters, Chair). Although the board said a hearing date of Jan. 31, 2008, was set in a prehearing conference on Oct. 22, 2007, *id.* at 9 n.70, no prehearing conference note or summary is contained in the record transmitted to the commission. The commission also notes that the record does not contain an original decision document signed by the board panel members.

[35] *Id*. at 12.

[36] *Id.* at 9 (citation omitted) (emphasis in original).

[37] *Id.*

The board then reasoned that

> The court specifically found substantial evidence to support our factual findings that the employer resisted the employee's benefits, and that the employee retained an attorney in the successful prosecution of his claim. Accordingly, we will apply the Alaska Supreme Court rationale in *Moore* as the legal standard in determining the employee's entitlement to attorney fees under AS 23.30.145(b).[38]

Notwithstanding its decision to obey the court's remand, the board then engaged in the same reasoning it used in its first decision, citing to the same cases:

> Under AS 23.30.260 the employee's attorney may receive fees in respect to the claim only with our approval. In this case, we find the payment of the benefits claimed by the employee, was resisted by the action of the employer. The employee seeks an award of attorney's fee and legal costs under subsection AS 23.30.145. We have awarded the employee her [sic] claimed TTD benefits and medical benefits [sic]. Consequently, we can award fees under AS 23.30.145. [39]

The board continued:

> Subsection .145(b) requires the award of attorney fees and costs to be reasonable. The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*[40] held that our attorney fee awards should be reasonable and fully compensatory, considering the contingent nature of representing injured workers, to insure adequate representation. We consider the nature, length, and complexity of the services performed, the resistance of the employer, as well as the benefits resulting from the services obtained, when determining reasonable attorney fees for successful prosecution of claims.[41]

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[38] *Id.* at 10 (citations omitted).

[39] *Id.* at 11 *(citing Houston*, 586 P.2d at 620*; Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993) and, earlier in the quote, *Wien Air Alaska v. Arant,* 592 P.2d 352 (Alaska 1979)).

[40] 718 P.2d 971, 974-75 (Alaska 1986).

[41] *Jerry D. Moore,* Alaska Workers' Comp. Bd. Dec. No. 08-0033 at 11-12 (*citing Thompson v. Alyeska Pipeline Service Co.,* Alaska Workers' Comp. Bd. Dec. No. 98-0315 (Dec. 14, 1998)).

The board then turned to the facts of the case before it. It made the following findings:

> In light of these factors, we have examined the record of this case. The employee has filed no affidavits itemizing hours of attorney time. His attorney indicated these records no longer exist. In his best judgment, and to the best of his memory, he asserted the fees should be between $7,500.00 and $12,000.00. We take administrative notice that this attorney bills $250.00 per hour for his service. We note the claimed hourly rate of $250.00 is within the reasonable range for experienced employees' counsel in other cases, based on expertise and years of experience. This would translate to between 30 and 48 hours of billable work, based on the attorney's estimate. We find this range of time is reasonable. Under 8 AAC 45.195, based on the unique facts of this case, we will waive our procedural requirement to allow the employee to request fees with out an itemized affidavit of hours. Having considered the nature, length, and complexity of the services performed, the resistance of the employer, and the benefits resulting to the employee from the services obtained, we find 40 hours of time would be reasonable. We conclude the employee is entitled to $10,000.00 in fees for his attorney, under AS 23.30.145(b).[42]

This appeal followed.

2. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[43] The board's determination of the credibility of a witness who appears before the board is binding on the commission.[44] The commission is required to exercise its independent judgment on questions of law and procedure within the scope of the Alaska Workers' Compensation Act.[45] If the commission must exercise its independent judgment to interpret the Act, where it has not been addressed by the Alaska Supreme Court, it draws upon its specialized

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42 *Id*. at 12 (citations omitted).

43 AS 23.30.128(b).

44 *Id*.

45 *Id.*

knowledge and collective experience and expertise in workers' compensation[46] and adopts the "rule of law that is most persuasive in light of precedent, reason, and policy,"[47] to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.[48]

3. Discussion.

a. Exercise of commission jurisdiction does not infringe on the Superior Court's jurisdiction, because no proceedings are pending in the court and the superior court did not retain implicit or explicit jurisdiction.

The appellee challenges the appeal to the commission on jurisdictional grounds, without seeking removal to the superior court. He asserts that any decision by the commission would "interpret the sufficiency of the order on remand to the Board" and that the commission cannot act on cases "in an appellate footing before it existed."[49] The appellee asserts that the commission does not have authority to review whether the board properly interpreted AS 23.30.145(b) in awarding an attorney fee required under terms of the Supreme Court's remand.

The commission has repeatedly refused to exercise jurisdiction where to do so would infringe on the jurisdiction of the superior court, when the superior court's remand to the board is followed by an appeal to the commission.[50] The commission

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[46] *See Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

[47] *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

[48] *Conam Constr. Co. v. Bagula*, Alaska Workers' Comp. App. Comm'n Dec. No. 024 at 5, 2007 WL 80650 (Jan. 9, 2007).

[49] Appellee's Limited Opposition Br. 3.

[50] *Pietro v. Unocal Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 082 (June 26, 2008); *Thoeni v. Consumer Elec. Servs.*, Alaska Workers' Comp. App. Comm'n Dec. No. 039 (Apr. 30, 2007); *Wolf Dental Servs.*, *Inc., v. Wolf*, Alaska Workers' Comp. App. Comm'n Dec. No. 031 (Feb. 2, 2007); Section 80, ch. 10 FSSLA 2005 saved jurisdiction over pending appeals to the superior court, which the commission interpreted to mean that the legislature intended that appeals pending in the superior court on the effective date of the legislative repeal "may continue and be completed"

has held that the superior court's jurisdiction is not cut off when the board's decision on remand *from the superior court* occurs after the effective date of the 2005 amendments creating the commission.[51] In some cases, the board's decision covers more than just the remanded issue, as when it addresses new claims that have arisen since the decision appealed to the superior court. In such cases, if the commission

> decided the merits of the appeal of remanded issues, [the commission] would necessarily infringe on the exercise of the Superior Court's jurisdiction and may possibly infringe on the exercise of the Superior Court's jurisdiction in other claims arising out of the same injury and facts. We must decline to act on this appeal until the Court instructs us on the extent of the Superior Court's jurisdiction.[52]

The commission's deference to the superior court's jurisdiction is based on the principle that when the superior court remands to the board for further action, the superior court has not entered a final, appealable order.[53] The superior court implicitly retains jurisdiction to examine the results of the board proceedings on remand and to enter a final appealable order after the board's order reaches it.[54]

However, in this case, Judge Torresi entered a final, appealable order affirming the board's decision. He did not retain jurisdiction because he did not remand the case to the board for action. No decision by the commission is likely to infringe on the

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notwithstanding the effect of section 41 of the same bill. *Adepoju v. Fred Meyer Stores, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 010, 5 (May 11, 2006).

[51] *Pietro,* App. Comm'n Dec. No. 082 at 5.

[52] *Thoeni*, App. Comm'n Dec. No. 039 at 9.

[53] *Thoeni v. Consumer Elec. Serv.*, 151 P.3d 1249, 1253 (Alaska 2007); *see also Gunter v. Kathy-O-Estates*, 87 P.3d 65, 71 n.21 (Alaska 2004); *Tlingit-Haida Regional Elec. Authority v. State*, 15 P.3d 754, 761 (Alaska 2001); *Stalnaker v. Williams*, 960 P.2d 590, 592 n.3 (Alaska 1998).

[54] *Municipality of Anchorage, Police and Fire Retirement Bd. v. Coffey*, 893 P.2d 722, 725 n.6 (Alaska 1995) (strictly ministerial act ordered on remand does not defeat finality of superior court's order); *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965), *overruled in other part by City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n.6 (Alaska 1979).

Superior Court's jurisdiction in this case, because the superior court no longer has jurisdiction over a pending appeal.

The Supreme Court reversed the board's award of fees under AS 23.30.145(a) and remanded the case to the board for a determination of a fee under AS 23.30.145(b). The Supreme Court did not retain jurisdiction, because it did not need to do so. The Supreme Court has the authority to review commission decisions and through it, the board's decisions; it need not review the board's decisions directly.[55]

The commission, like the board, must follow the rulings of the Supreme Court regarding awards of fees under AS 23.30.145(b). The commission's understanding of the workers' compensation statutes and workers' compensation cases is subject to Supreme Court review. The board had not decided a claim for fees in this case limited to AS 23.30.145(b),[56] and the commission, like the board, must adhere to the Supreme Court's decision in this case. The Supreme Court may correct any misunderstanding by the commission of the Court's ruling in this case on appeal.

Finally, the commission notes that appellee did not request removal to the superior court, but dismissal of the appeal.[57] Since the date for appeal to the superior court is past, the action advocated by the appellee would leave the appellant without an appeal. The appellant has a right to an appeal – to the commission or, if the board's

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[55] The appellee argues that the commission does not have the authority to "interpret" the Supreme Court's decisions. Appellee's Br. 3. The commission obeys and follows the Supreme Court's decisions; the commission applies the Supreme Court's decisions as it collectively understands them, confident that the Supreme Court will provide the commission with further guidance and correction if necessary.

[56] The commission notes that on reconsideration the board corrected the statement of the issue before it so as not to limit its determination to AS 23.30.145(b). *Jerry D. Moore v. N C Machinery,* Alaska Workers' Comp. Bd. Dec. No. 04-0229, 14 (Sept. 24, 2004) (W. Walters, Chair.); R. 0279.

[57] Appellee's Br. 3. The commission gave the parties notice of a possible jurisdictional issue and stated that it would rule on a motion to dismiss the appeal before considering the merits of the appeal. The appellee declined to move to dismiss the appeal, but limited his brief on appeal to the jurisdictional question.

decision was issued on remand from the superior court, back to the superior court.[58] However, because there is no remand from the superior court with implicitly retained jurisdiction, appellant would have no right to file a *new* appeal in the superior court.[59] The commission does not interpret AS 23.30.129 to mean that parties will be left with no avenue of appeal of a board decision; the Supreme Court did not suggest that was the effect of the 2005 amendments to the Alaska Workers' Compensation Act in *Alaska Public Interest Research Group v. State of Alaska.*[60]

Therefore, the commission rejects the appellee's request to dismiss this appeal for lack of jurisdiction.

b. The board lacked substantial evidence to excuse non-compliance with 8 AAC 45.180.

The Supreme Court ruled that "[b]ecause the Board made findings based on substantial evidence that satisfied both requirements for an award of attorney's fees pursuant to AS 23.30.145(b), Moore is entitled to reasonable attorney's fees in this case."[61] The board was directed to determine "what reasonable fees are due under AS 23.30.145(b)."[62] Therefore, the commission does not consider the argument that failure to file a fee affidavit disqualifies the employee from an award of reasonable attorney's fees or constitutes a waiver of a claim for fees under AS 23.30.145(b).

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[58] In cases in which the commission defers to the superior court's jurisdiction, the commission concluded that the exclusion of appeal from the commission to the superior court found in AS 23.30.129 is not a barrier to *resumption* of proceedings in the superior court. Instead of filing a new appeal from the board's most recent order and moving in superior court to consolidate it with the earlier appeal, the appellant may move the superior court, in the first appeal, for proceedings to resume in that appeal. *See Wade Oilfield Serv. Co. v. Providence Washington Ins. Co. of Alaska*, 759 P.2d 1302, 1305 (Alaska 1988) (*citing Jeffries v. Glacier State Telephone*, 604 P.2d 4, 6-7 (Alaska 1979)).

[59] AS 23.30.129.

[60] 167 P.3d 27 (Alaska 2007).

[61] *Harnish Group Inc.*, 160 P.3d at 154.

[62] *Id*.

The board made the following explicit findings of fact in support of its award of a $10,000 attorney fee:

1. No affidavit of attorney time was filed under 8 AAC 45.180(d).
2. The attorney stated these records no longer exist.
3. The attorney asserted that to the best of his memory and in his best judgment, the fees should be between $7,500 and $12,000.
4. The attorney bills $250/hour for his services.
5. At $250/hour, the fee range would translate to between 30 and 48 hours of billable work.
6. A reasonable range of work was 30 to 48 hours.

Based on all the facts of the case, the board concluded that 40 hours of time is reasonable. Without specifying the facts that it relied on, the board also concluded that it was "reasonable" to waive the "procedural requirement" [of 8 AAC 45.180] to allow the employee to request fees without an itemized affidavit of hours.

After carefully reviewing the record, the commission found that the attorney did not say that *all* his records were destroyed. He said that "I couldn't legitimately put together a .145(b) affidavit, given I'm about three *billing systems* down the road from then. *Those records* simply don't exist anymore."[63] However, he did not say that *no records* of the case existed. He admitted that he had scanned the case file when he said, "I'm not going to go through the file, which has been scanned and shredded, and try to conjure up something that I'm going to put my name to an affidavit as far as the time is concerned."[64] Instead, he would "just submit the matter" to the board.[65]

Asked for his opinion of a reasonable fee, he responded, "I suspect that the .145(b) fees, strictly in my opinion based on my recollection of the case and the volume

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[63] Hrg Tr. 52:9-12 (Jan. 31, 2008). He later said, "I can't legitimately file a .145(b) affidavit without the records, which don't exist anymore." Hrg Tr. 54:12-14.

[64] Hrg Tr. 55:3-6.

[65] Hrg Tr. 52:13. In effect, the appellee's attorney invited the board to "pick a number."

of paper, are probably substantial, but I can't tell you what they are, and that's all I can offer at this point."[66] Later, speaking to the volume of paper, he said,

> The file *by the time we got done with this* was basically a milk carton full of material. I dealt with the reemployment benefits issue through a failed plan, and I can't immediately recall the number of medical summaries that were done, but we had a hearing on this and we also had reconsideration. I've been dealing with it ever since.[67]

The board's record contains no medical summaries prepared by the appellee's attorney before the board's 2004 hearing, although the appellant's attorney had filed a 13-page medical summary in February 2004.[68] There were no hearings on the reemployment plan, and most of the reemployment records are reports from the reemployment specialist, or requested from others by the specialist. The board's record contains less than 250 pages of paper filed before February 12, 2004, in a claim that was then more than two years old.[69]

8 AAC 45.180 provides in pertinent part:

> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law . . . . 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 . . . . 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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> (c) Except as otherwise provided in this subsection, an attorney fee may not be collected from an applicant without board approval. . . .

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66 Hrg Tr. 55:19-23 (Jan. 31, 2008).

67 Hrg Tr. 58:6-11.

68 R. 0309-0321.

69 The following portions of the record were filed on or before February 12, 2004: R. 000001-15; R. 000044-65; R. 000089-94; R. 0100-250 (reemployment reports); R. 000253-56; R. 0341-346.

> (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.
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> (e) Fee contracts are not enforceable unless approved by the board. The board will not approve attorney's fees in advance in excess of the statutory minimum under AS 23.30.145.

8 AAC 45.195 provides:

> A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

8 AAC 45.180(d)(1) provides that an attorney may waive a right to fees in excess of the statutory minimum *if AS 23.30.145(a) applies* by failing to file an affidavit "itemizing the hours expended as well as the extent and character of the work performed." Thus, by failing to file a fee affidavit in 2004, the employee's attorney waived fees that might

exceed the statutory minimum. However, the Supreme Court held that AS 23.30.145(a) does not apply to this claim for attorney fees, so the failure to file a fee affidavit in 2004 (or 2008) deprived the board of evidence on which to base a fee "reasonably commensurate with actual work performed."

In awarding a reasonable fee under AS 23.30.145(b), 8 AAC 45.180(d) requires the board to "award a fee reasonably commensurate with *the actual work performed*" and to "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." The timing of the submission of the affidavit and the form of the affidavit are procedural matters. Given the regulation's requirement that the board consider the affidavit as a source of information, however, the content of the attorney's fee affidavit is not a mere procedural device or requirement; it is a part of the *evidence* the board must consider when making a finding of the "actual work performed." In other words, 8 AAC 45.180(d) requires some evidence from the attorney relating to the "the hours expended as well as the extent and character of the work performed" so that the board may determine a fee reasonably commensurate with the actual work performed.

In this proceeding, the board could excuse Beconovich's failure to file a fee affidavit in 2004 under 8 AAC 45.195, because it would be manifestly unjust to require that he have sought fees "in the alternative" in 2004, instead of under AS 23.30.145(a). The board could excuse the failure to file an attorney fee affidavit in 2008 "if manifest injustice to a party would result from a strict application of the regulation." However, the board may not excuse a failure to submit *any* evidence in support of the claim for fees, because the requirement that an award of fees be based on evidence is not procedural. AS 23.30.145(b) states that the board "shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees." The board's determination of what is "reasonable" must be based on evidence that a reasonable mind might accept to support a conclusion; it cannot be a number plucked from the air.

Beconovich stated he did not want to file an affidavit because he did not have billing records for 2003 through Feb. 12, 2004. He also did not want to review his scanned files to reach an approximation of the work he performed through February 12, 2004.[70] He said that "I'm not going to go through the file, which has been scanned and shredded, and try to conjure up something that I'm going to put my name to an affidavit." His objection was not that he *could not review the records,* but that he could not say with certainty that the hours he estimated were accurate. However, the requirement for evidence to support an award under AS 23.30.145(b) can be satisfied by referring to the actual work performed and using an approximation of the average time needed for such work. Beconovich could also refresh his recollection by referring to the work he performed and documents received. It would not be manifestly unjust to require the person with the best possible evidence of the work performed to present an approximation, based on extant records and refreshed recollection, of "the hours expended as well as the extent and character of the work performed."

The board did not have substantial evidence that it would be manifestly unjust to require Beconovich to submit *some evidence* of the actual work performed in this case in support of his fee claim because records of the work actually performed exists in the scanned case file. Although Beconovich stated that he did not have "billing" records for 2003-2004 because he has moved to other billing systems (evidently without preserving a paper record to scan in the case file), it is possible to re-create an approximate base of actual work performed from the case file. In the absence of manifest injustice, excusing Beconovich from presenting any evidence of actual work performed permits "a party to disregard the requirements of law."[71]

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[70] Although Beconovich testified to a "milk crate" of paper when the case was over, he did not say that he had a "milk crate" of paper on Feb. 12, 2004. The size of the board's record before Feb. 12, 2004, is quite small. "When the case was over" could also refer to when the Supreme Court appeal was over or when the board hearing on attorney fees was over.

[71] 8 AAC 45.195.

c. The board's methodology of using comparable awards may be used in appropriate cases, but the board must use close comparisons.

In the absence of records of actual work performed, or any estimate offered by Beconovich more definite than his statement that the work done was "substantial," the board asked Beconovich for his opinion regarding his typical fee for a similar case:

> Chair: Well, let me ask this. I mean, obviously, we don't take testimony as such, but you're an officer of the court. For a case of comparable complexity in the past what have you, if you can, seen as a typical amount of reasonable fees that would be charged for doing that, Mr. Beconovich?
>
> Mr. Beconovich: Well, you know, at this point we reason – we pretty typically get a hearing and (indiscernible) hearing for fees that are anywhere from $7500 to $12000, which of course is approximately what – the .145(b) fees that were paid out over time on this case, but unless it's an extraordinary case, a lot of depositions and travel that is realistically what the board has awarded for the standard (indiscernible) case, so you know, I think it's rare essentially that – unless it's an unusual case – that the fees exceed $10,000, at least the way I run my office (indiscernible), but I think that's been my experience (indiscernible).[72]

Based on this exchange, the board found that Beconovich asserted that to the best of his memory and in his best judgment, the fees should be between $7,500 and $12,000 in this case. However, although the chair phrased the question as asking for Beconovich's charges in a "case of comparable complexity in the past," it is clear that Beconovich did not limit his response to his charges, cases of comparable complexity or cases in the comparable past. He prefaced his statement of the range of fees with "we pretty typically get a hearing," but the employer "unqualifiedly accepted Moore's claim for PTD benefits in its answer to the claim" on February 12, 2004.[73] There was no hearing on the entitlement to permanent disability compensation. Beconovich characterized the "$7500 to $12000" as the board award in a standard case, not what

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[72] Hrg. Tr. 60:20 – 61:11 (Jan. 31, 2008).

[73] *Harnish Group, Inc.*, 160 P.3d at 151-52.

he billed.[74] Moreover, it is not at all clear that Beconovich actually stated that, as the board characterized it, in the best of his memory and in his best judgment, the fees *should be* between $7,500 and $12,000. The commission concludes that a reasonable mind could not accept this statement as tending to prove that Mr. Beconovich would have charged fees in a case of comparable complexity in 2004 totaling $7,500 to $12,000.

It is acceptable, when there is no evidence of the actual work performed, to establish a reasonable fee by comparison to like cases of similar complexity and events. However, that is not what the board did in this case. The board relied on its current experience, not the historical record of the fees awarded in similar cases. The comparison should have been drawn to cases where the employer admitted liability for the claimed benefit immediately after a claim was filed. The comparison should have been drawn to cases of the same time period in which the services were performed. In this case, the difference is substantial.

The board clearly relied on its knowledge that $250 per hour was the current rate charged by Beconovich. However, in a case decided in early 2004, *Jason P. Beatty v. Wolverine Supply, Inc.*,[75] the board noted that "[i]n decision and orders on other claims, we found an attorney fee of $175.00 per hour to be reasonable" for Beconovich.[76] In *Jason P. Beatty*, which concerned contested claims for temporary total disability, temporary partial disability, and a compensation rate adjustment, and which

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[74] The difference between award and charges is significant. The board may reduce a fee based on AS 23.30.145(b) from the amount billed if the employee failed to prevail on all issues; or the board's award may be based on AS 23.30.145(a). The amount awarded by the board is not directly comparable to the amount charged by the attorney. Beconovich's assertion of his usual award is not necessarily evidence of the usual amount of time an attorney spends on a case.

[75] Alaska Workers' Comp. Bd. Dec. No. 04-0050, 2004 WL 398543 (March 1, 2004) (W. Walters, Chair).

[76] *Id.* at 14.

went to hearing with at least three fact witnesses,[77] Beconovich submitted a fee affidavit of 34.9 hours at $175.00 per hour[78] and was awarded a fee of $6,107.50.[79] The difference between $175 per hour and $250 per hour is substantial, and represents an increase of 43% over four years. The board was required to determine the reasonable fees for work performed in 2003 and 2004; the board's "administrative notice" of current rates is not evidence of the reasonable rate four or five years ago. Therefore, the board's determination that $250 per hour represents a reasonable fee for the work performed is not supported by substantial evidence.

Finally, we turn to the board's determination that 30 to 48 hours represented a reasonable estimate of the number of hours an attorney would have devoted to this case over the course of a year. The board's estimate was the result of dividing the hourly rate into the attorney's recollection of his usual fee award for a typical case. There was no evidence, beyond Beconovich's statement, to support the board's findings. The board said it considered "the nature, length, and complexity of the services performed, the resistance of the employer, and the benefits resulting to the employee," but the decision contained no discussion of the nature, length and complexity of Beconovich's services and no findings as to what those services were. The board failed to cite to comparable cases in the same time period. For example, although the board may rely on its fund of experience to determine that a workers' compensation claim is more than, or less than, what would be considered complex, mere recitation that it considered this factor does not inform the parties of the board's findings regarding complexity or how the degree of complexity affected the analysis that resulted in a fee of $10,000, 63 percent more than was awarded in *Jason P. Beatty,* a relatively complex case that went to hearing. Therefore, the commission determines that the board's finding that 30 to 48

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[77] *Jason P. Beatty,* Bd. Dec. No. 04-0040 at 4 (indicating the supervisor testified by deposition, Woody Minton and Jason Beatty testified at hearing). The board also noted that the claimant also gave deposition testimony. *Id.*, n.25.

[78] *Id.* at 6.

[79] *Id*. at 15.

hours is a reasonable range of time for this case was not supported by substantial evidence in light of the whole record.

4. Conclusion.

The commission concludes that the board lacked substantial evidence to support its award of $10,000 in attorney fees on three points. The board lacked substantial evidence to excuse the attorney from providing any evidence of his actual work performed. The board lacked substantial evidence to find that an attorney fee based on an hourly range of 30 to 48 hours work was reasonable in this case. The board lacked substantial evidence to support an hourly rate of $250 for work performed in 2003. However, the board did not lack substantial evidence to support *some* award of attorney fees under AS 23.30.145(b).

The commission REMANDS the case to the board for REHEARING, so that the board may take evidence in accordance with this decision. The commission does not retain jurisdiction.

Date: *24 Dec. 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision of the commission on this appeal, but this is a not a final administrative agency decision on the employee's claim for attorney fees. The commission vacated (made void) the board's decision and order and remanded the case to the board to rehear the claim, taking more evidence and deciding the claim again. The effect of the commission decision is to correct errors of law and to direct the board to complete its proceedings in this case and issue a final decision on the claim for attorney fees. The commission did not retain jurisdiction.

This decision becomes effective when it is distributed (mailed) by the appeals commission unless proceedings to appeal it are instituted (started). To find the date of distribution, look at the clerk's Certificate of Distribution box below.

Proceedings to appeal must be instituted in the **Alaska Supreme Court** within 30 days of distribution of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. Because this is not a final decision on the claim, the Supreme Court may, or may not, accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. The commission's decision directs the board decide the claim, so that a final administrative decision has yet to be issued. However, if you believe grounds for review exist under the Appellate Rules, you should file your petition at the Supreme Court within 10 days after the date of this decision. For more information, contact

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. A motion for reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 095, the decision in the appeal of *Harnish Group, Inc., d/b/a N. C. Machinery Co. and Alaska National Insurance Co. v. Jerry D. Moore,* Appeal No.08-010; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *24th* day of *December*, 200*8*.

Signed
J. Ramsey, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision No. 095 issued in AWCAC Appeal No. 08-010 was mailed on *12/24/08* to R. Beconovich and R. Wagg at their addresses of record and faxed to Wagg, Beconovich, Director WCD, AWCB –Fbx & AWCB Appeals Clerk.

Signed
J. Ramsey, Deputy Appeals Commission Clerk Date