

Alaska Workers' Compensation Appeals Commission

Municipality of Anchorage and Ward
North America,
Movants,
vs.

David N. Syren,
Respondent.

Final Decision and Order
On Motion for Attorney Fees
Decision No. 015 August 3, 2007
AWCAC Appeal No. 06-003
AWCB Case No. 200319873M

Final Decision and Order on Motion for Attorney Fees following decision on Motion for Extraordinary Review from the Alaska Workers' Compensation Board Decision No. 06-0004; Rebecca Pauli, Chairman; David Kester, Member for Management; John Abshire, Member for Labor.

Appearances: Trena Heikes for Movants Municipality of Anchorage and Ward North America; Chancy Croft for Respondent David N. Syren.

Before: Jim Robison and Philip Ulmer, Commissioners, Kristin Knudsen, Chair.

By: Kristin Knudsen, Chair.

Following our March 7, 2006 decision,¹ the respondent, David Syren, sought an attorney fee award as the successful party. We suspended consideration of the motion until the Alaska Supreme Court responded to the petition for review filed by the Municipality. For the following reasons, we award a fully compensatory and reasonable attorney fee to Syren.

Arguments presented to the commission.

Syren argues that he has shown himself to be the successful party because he obtained the relief he requested and "successfully resisted" the motion for extraordinary

¹ *Municipality of Anchorage v. Syren*, AWCAC Decision No. 7 (March 7, 2006).

review. Therefore, he is entitled to fees under AS 23.30.008(d).²

The Municipality argues that the commission does not have the authority to award an attorney fee on a motion for extraordinary review, because our statute grants the commission authority to award an attorney fee "in an appeal."³ The Municipality argues that because AS 23.30.145 and Alaska Rule of Appellate Procedure 508(g) limit the board and the court to awarding attorney fees on a successful claim, the claimant must succeed on the claim itself and not on a collateral issue.⁴ The Municipality argues that until Syren is ultimately successful on his claim, no attorney fee may be awarded.

The commission's authority to award attorney fees.

We acknowledge that AS 23.30.008(d) is modeled on Alaska Rule of Appellate Procedure 508(g)(2), of which the Supreme Court said:

Alaska Appellate Rule 508(g)(2) calls for an award of "full reasonable attorney's fees ... to a successful claimant" in an administrative appeal. In order to recover fees under AS 23.30.145(b), which like Rule 508(g) directs a fee award to a "successful" claimant, the employee must succeed on the claim itself, and not a collateral issue. *Adamson v. University of Alaska*, 819 P.2d 886, 895 (Alaska 1991). Childs lost on

² AS 23.30.008(d) provides:

(d) In an appeal, the commission shall award a successful party reasonable costs and, if the party is represented by an attorney, attorney fees that the commission determines to be fully compensatory and reasonable. However, the commission may not make an award of attorney fees against an injured worker unless the commission finds that the worker's position on appeal was frivolous or unreasonable or the appeal was taken in bad faith.

³ The Municipality's position is similar to that taken by Syren in response to the Motion for Extraordinary Review, that the commission lacked authority to hear a motion for extraordinary review because it was limited to hearing "appeals from final decisions." Resp't's Mem. in Opp'n to the Municipality of Anchorage's Mot. for Extraordinary Rev., 4.

⁴ The Municipality cites in support *Childs v. Copper Valley Elec. Ass'n*, 860 P.3d 1184 (Alaska 1993) and *Sulkosky v. Morrison-Knudsen*, 919 P.2d 158 (Alaska 1996).

his main claim: his effort to win those disability and medical benefits that CVEA still controverted. Therefore, the superior court did not err in denying attorney's fees for the whole claim.⁵

The Supreme Court did not require that the claimant succeed on the whole claim to obtain a partial award in an appeal. We read *Childs* as requiring that the commission's fee award reflect the degree of success of the party. In addition to the fee being "reasonable," the commission's fee award must be "fully compensatory," thus implementing the policy stated in *Wise Mechanical Contractors v. Bignell*⁶ that in workers' compensation cases the objective is to make attorney fee awards both fully compensatory and reasonable so that competent counsel will be available to furnish legal services to injured workers.

Unlike AS 23.30.145(b), our statute directs the commission to make an award of "fully compensatory and reasonable attorney fees" to a "successful party," not for prosecution of a "successful claim." As we have said previously, there is a distinction to be drawn between a "successful party" and a "successful claimant:"

Unlike AS 23.30.145(b) awards by the board, which are based on the "successful prosecution of the claim," awards by the commission are based on status as a "successful party." The distinction is an important one, recognized in *Adamson*, 819 P.2d at 895. Before the board, the claim must ultimately succeed. However, successful party status is like prevailing party status, which "does not automatically follow if the party receives an affirmative recovery but rather it is based upon which party prevails on the main issues." *Hutchins v. Schwartz*, 724 P.2d 1194, 1204 (Alaska 1986), citing *Continental Insurance Co. v. United States Fidelity & Guaranty Co.*, 552 P.2d 1122, 1125 (Alaska 1976) *disapproved on other grounds*, *Farnsworth v. Steiner*, 638 P.2d 181 (Alaska 1981). A party who successfully defeats a claim of great potential liability may be the prevailing party even if the other side is successful in receiving an affirmative recovery. *Id.*, *Alaska Placer Co. v. Lee*, 553 P.2d 54, 63

⁵ *Childs*, 860 P.2d at 1193.

⁶ 718 P.2d 971, 975 (Alaska 1986).

(Alaska 1976), see also *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 314 n. 5 (Alaska 1972).⁷

Ordinarily, no award of attorney fees for work before the commission would be made until the conclusion of an appeal. However, a motion for extraordinary review is, as its name suggests, an extraordinary proceeding. It is fundamentally a request to be allowed to appeal a board order that otherwise may not be appealed. If review is granted, an appeal goes forward; if denied, no appeal is allowed. Our decision denying the request for extraordinary review terminated all proceedings in the case before the commission except this motion. This case may not appear before the commission again.⁸ We do not interpret the authority to award attorney fees "in an appeal" to limit us to awarding fees only upon conclusion of a fully litigated appeal; we believe it extends to appeals dismissed before they are heard and appeals requested, but not allowed.

The board has no power to order a fee award for work performed before the commission at the conclusion of the claim before it. Counsel for a successful party must request an award of fees within 10 days after the commission's decision.⁹ Unless the commission awards a fee after the commission decision, no fee may be awarded. We believe the public policy embodied in the directive that the commission "*shall* award

⁷ *Doyon Drilling, Inc., v. Whitaker*, AWCAC Decision No. 008, 3-4, n. 6 (April 14, 2006).

⁸ One of the parties could ultimately appeal to the commission from the board's decision on the claim, but there is no certainty of that occurring. The parties may settle the claim or the resolution by the board may be satisfactory to the parties.

⁹ 8 AAC 57.260 provides:

(a) A successful party may file a motion requesting attorney fees and costs as provided in AS 23.30.008(d).

(b) Counsel for a successful party shall serve and file an affidavit of services rendered on appeal within 10 days after the date of notice of a decision of the commission, as provided in 8 AAC 57.220.

(c) The panel will award attorneys fees and costs as provided in AS 23.30.008(d).

a successful party reasonable costs and . . . attorney fees that the commission determines to be fully compensatory and reasonable” is not served by leaving work before the commission uncompensated when proceedings before the commission are concluded.

On the other hand, while the commission’s statute emphasizes the success of the party, rather than the claim, a party’s ultimate success is difficult to assess before the conclusion of the case. A party who succeeds in obtaining extraordinary review may not be successful in “the main issues” of the claim; a party who defeats a motion for extraordinary review may nonetheless prove ultimately unsuccessful in obtaining most of the compensation sought. While payment of an award of attorney fees on a motion for extraordinary review may be premature prior to the final award of the board, in view of the mandatory language of AS 23.30.008(d) we cannot defer determination of the fees owed for work before the commission until all administrative proceedings have concluded.

It is true that in the present case a determination of who is a successful party in terms of the whole case is premature. The case is still in the early stages of discovery. When the case was presented to the commission, a board-appointed independent medical examination had not occurred. Nonetheless, a determination of the attorney fees¹⁰ now owed for successful work before the commission will serve two useful purposes. First, it determines with finality the cost of the work before the commission, settling one dispute among the many that may make up a workers’ compensation case, and so advancing the final resolution of the case. Second, it does not discourage representation of injured employees before the commission by creating a class of attorney work that may be uncompensated in the workers’ compensation system. We are concerned that commission fee awards during board proceedings may encourage the filing of motions for extraordinary review, thus interrupting the orderly process of board adjudication, or be premature in the context of a subsequent appeal. However,

¹⁰ The commission may receive evidence and make findings of fact when determining attorney fee awards. AS 23.30.128(c)(2).

bearing in mind the distinction the Supreme Court made in *Adamson* that the board should look at who “ultimately is successful on the claim, *as opposed to who prevails at each proceeding*,”¹¹ and the mandatory language of AS 23.30.008(d), we will not defer an award of attorney fees until the conclusion of the case.¹²

Findings of fact and conclusions of law.

We turn to the determination of the fees owed in this case. We make our findings of fact based on the affidavit filed by Syren’s attorney, Chancy Croft, our observation of counsel in oral argument, and our review of the pleadings.

The Municipality identified what it considered a denial of due process in the board’s refusal to direct discovery of certain hospital and insurance company records to the Municipality. It urged the commission to consider the filing of a workers’ compensation claim as a waiver of the physician-client privilege, analogizing to the Supreme Court’s holdings in a series of personal injury cases,¹³ and to enforce “full and unfettered” discovery. It viewed the board’s order as condoning a hospital’s refusal to provide direct discovery as requested because it could not assure delivery of records referring only to those body parts the employee claims he injured. The employer focused on a claim that the board’s discovery process violated the employer’s due process rights by preventing it from gathering evidence to defend against the claim.

Syren’s response incorporated more issues than the employer’s due process claim. Syren urged the commission to (1) declare it had no authority to hear motions for extraordinary review because it could only hear appeals from final decisions and because the legislature did not grant it such authority; (2) deny the motion and find the board was correct; and, (3) deny the motion because the Municipality failed to present a situation of such magnitude that it justified interrupting the board’s usual process.

¹¹ *Adamson, supra*, at 895 (emphasis added).

¹² We note there was no request to stay payment of a fee award.

¹³ *Mathis v. Hildebrand*, 416 P.2d 8 (Alaska 1966); *Trans-World Investments v. Drobny*, 554 P.2d 1148 (Alaska 1976); *Arctic Motor Freight v. Stover*, 571 P.2d 1006 (Alaska 1977).

We find that Syren was a successful party on the main issue before the commission because the commission denied the Municipality's motion for extraordinary review as premature. We did not grant the motion for extraordinary review, which was the result Syren sought.¹⁴ Syren was a successful party in the proceedings before the commission, but he was not successful in his challenge to the commission's authority to hear motions for extraordinary review. The number of pages of discussion devoted to those issues in his brief, is a measure of its significance to Syren, we note also that the only citations to authority (other than a reference to the commission's regulations) are contained in that discussion.

We find Syren's attorney's affidavit contains charges for time and services performed after our decision was issued.¹⁵ We do not include such services in those performed in order to obtain the commission's decision. We also do not include charges for "double-billed" activity; time spent by an attorney instructing a paralegal should not also be billed by the paralegal as time "conferring" with the attorney. We find such double billings on January 20, January 24, January 30, January 31, and February 14, 2006. From each of those days we subtract 0.1 hour, the minimum unit of time recorded by both the attorney and the paralegal, and we subtract it from the reported paralegal time. We note the Municipality's objection that considerable time was spent preparing for oral argument before the commission, but we find the time

¹⁴ Both parties may be partially successful, but we may not award fees against an injured worker unless we find the worker's position on appeal was frivolous or unreasonable, or the appeal was taken in bad faith. AS 23.30.008(d). There is no claim that Syren's position was frivolous or unreasonable, and we find that it was neither frivolous nor unreasonable. Thus, even if the Municipality prevailed in part before the commission, no fee may be awarded.

¹⁵ March 7 through March 14, 2006, a total of 5.3 hours (5.2 hours attorney time, 0.1 hours paralegal time) was reported, including 2.9 hours to prepare a motion for reconsideration that was not filed.

reported includes time spent in argument and that both parties were well-prepared for commission's questioning in oral argument.¹⁶

We find, based on the affidavit submitted, that Syren's attorney devoted 21.4 hours of attorney time,¹⁷ and 15.6 hours of paralegal time, to prepare the response to the motion for extraordinary review, for a total fee of \$7,980.00.¹⁸ We find Syren prevailed on the main issue on the motion for extraordinary review, but, in order to reflect his lack of success on the issue of the commission's authority, the fee should be reduced. Taking into account the relative complexity of the issue, the commission's previous decisions on the issue, and the importance accorded to it by Syren, we find a fee reduction of 20 percent reflects Syren's partial lack of success. We conclude that an attorney fee of \$6,384.00 represents a fully compensatory and reasonable fee for the work performed by Syren's attorney before the commission on the motion for extraordinary review filed by the Municipality on January 17, 2006. Costs were not requested.

Conclusion and award of fees.

We found that Syren was a successful party in the proceedings before the commission. We determined that an attorney fee of \$6,384.00 represents a fully compensatory and reasonable fee for the work performed before the commission. We therefore AWARD an attorney fee of \$6,384.00 to the respondent pursuant to

¹⁶ Oral argument allows the commission an opportunity to question the parties regarding their reasoning, their authorities, and their support in the record; therefore, the commission appreciates the value of preparation.

¹⁷ The Municipality's attorney reported she spent 17.4 hours to prepare a thorough and well-supported motion. On this basis, she argues that Syren's time is excessive. Had Syren's attorney's response been confined to his few paragraphs devoted to the merits of the Municipality's motion, we would find the hours reported excessive for the product filed. However, Syren's attorney focused his response on other arguments, in writing and in oral argument to the commission. Considering the range of arguments presented, we do not find the total time charged was excessive.

¹⁸ The Municipality submitted no evidence that the hourly fee charged by Syren's attorney was "manifestly unreasonable." *State, Dep't of Revenue v. Cowgill*, 115 P.3d 522, 524 (Alaska 2005). We consider that the hourly fee was not challenged.

AS 23.30.008(d). This award of fees shall accrue interest at the legal rate from the day after this order becomes final until paid.

Date: _____

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Jim Robison, Appeals Commissioner

Philip Ulmer, Appeals Commissioner

Kristin Knudsen, Chair

RECONSIDERATION

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

APPEAL PROCEDURES

This is a final decision of the Alaska Workers' Compensation Appeals Commission. It becomes effective when filed in the office of the Commission unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the effective date of this 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. AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the Commission, any proceedings to appeal 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).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately upon the effective date of this decision:

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order on Motion for Attorney Fees in the matter of Municipality of Anchorage v. Syren; AWCAC Appeal No. 06-003; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this ____ day of _____, 2006.

C. J. Paramore, Appeals Commission Clerk

I certify that a copy of the foregoing Final Decision on Motion for Attorney Fees in AWCAC Appeal No. 06-003 was faxed and mailed on _____ to Heikes, Croft, and the Director of the Workers' Compensation Division at their addresses of record.

C. J. Paramore, Appeals Commission Clerk Date