Alaska Workers' Compensation Appeals Commission

Conam Constr. Co. and ACE USA Ins. Co.,
Appellants,

vs.

Oliver Bagula, Peak Oilfield Serv., Alaska Ins. Guar. Ass'n, and Northern Adjusters,
Appellees.

Memorandum Decision
Decision No. 024 January 9, 2007

AWCAC Appeal No. 06-034
AWCB Decision No. 06-0297
AWCB Case Nos. 200324722,
199912374

Motion for Limited Stay of Payment Pending Appeal from Alaska Workers' Compensation Board Decision No. 06-0297, issued November 7, 2006, by the northern panel at Fairbanks, Fred G. Brown, Chair, Debra G. Norum, Member for Management, and Damian Thomas, Member for Labor.

Appearances: Timothy A. McKeever, Holmes, Weddle & Barcott, for appellants Conam Construction Co. and ACE USA Insurance Co.; Trena L. Heikes, Law Office of Trena L. Heikes, for appellees Peak Oilfield Services and Alaska Insurance Guaranty Ass'n; Tim MacMillan, Attorney at Law, for appellee Oliver Bagula.

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

Commissioners: Jim Robison, Chris Johansen, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

The appellants, Conam Constr. Co. and ACE USA Ins. Co., (hereafter Conam), filed a motion for limited stay of payment pending appeal,[1] asserting that there are serious and substantial questions raised on appeal and that they will suffer irreparable harm if a stay of the board's order is not granted. Appellee Bagula opposed the motion for stay on the grounds that the questions raised are not serious and substantial, but that the board's decision was based on well established interpretations of the law of

[1] The appellants do not seek stay of future periodic payments of compensation to Bagula. *Appellant's Application for Limited Stay of Order to Pay,* 1 (November 21, 2006).

workers' compensation and that no irreparable harm will come to Conam because reimbursement is substantially, if not wholly, available to the appellant under AS 23.30.155(d). Appellees Peak Oilfield Services, Alaska Ins. Guar. Ass'n, and Northern Adjusters, (hereafter Peak) also argued that the issues raised by Conam did not rise to the level of serious and substantial questions, but contended that reimbursement was available to Conam only to the extent of Peak's potential liability to Bagula. This reduced the potential irrecoverable overpayment to about $40,000, which Peak implies is not significant.

We heard oral argument on the motion December 11, 2006.[2] In the course of the hearing, the commission was informed that the time for reconsideration by the board had passed, so the only motion before the commission was the motion for stay.[3] Peak also confirmed that Peak's position is that AS 23.30.155(d) does not require reimbursement beyond the limits of its liability to Bagula. Because we conclude that complete reimbursement is available under AS 23.30.155(d), we find that the appellants are not likely to suffer irreparable harm. We therefore deny the motion for stay of payment pending appeal.

Factual background and board decision.

Oliver Bagula is a 63 year old retired mechanic who worked for Peak on the North Slope from 1986 until March 31, 2003. On April 1, 2003, Peak's service contract was assumed by Conam, and Bagula began working for Conam. Bagula stopped working for Conam about four months later. He had a total knee replacement in his right knee. He has not returned to work.

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[2] With agreement of the parties, the hearing on the appellants' motions was continued due to the sudden death of the grandmother and father of appellee Peak's counsel.

[3] Appellants also filed a motion to correct clerical error on December 11, 2006, to which no opposition is made. We note that the electronic filing of the Notice of Appeal was transmitted prior to closing November 21, 2006 (although not retrieved and printed until November 22, 2006) and therefore is timely under 8 AAC 57.050(b).

Bagula had injured his right knee working for Peak in 1999. He had surgery to repair a torn meniscus, paid by Peak. During the surgery, significant degeneration and chrondomalcia was found. Bagula's physician informed him that eventually he would need a total knee replacement. By August of 2003, Bagula's knee pain had reached the point that he asked for the replacement. Peak approved the surgery and paid compensation as well. However, in March 2005, Peak controverted payment based on the last injurious exposure rule. Bagula, who had filed a claim against Peak in 2004, now filed a claim for benefits and compensation against Conam. The parties agree that Bagula's 2003 wages were higher than his 1999 wages.

The board heard both of Bagula's claims together on April 13, 2006, and issued a decision, after supplemental briefing and depositions, on November 7, 2006. Relying on *Hawkins v. Greene Assoc.,*[4] the board decided that Conam was liable under the last injurious exposure rule, because, as the board found, the work at Conam worsened his symptoms and accelerated the need for surgery.[5] The board also excused Bagula's delay in giving a notice of injury because he had given verbal notice of the pain in his knee.[6]

Discussion.

The commission may grant a stay of past due or lump sum payments required by a board order if the commission finds that the party seeking the stay is able to demonstrate the appellant "would otherwise suffer irreparable damage"[7] and that the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful as to make . . . a fair ground for litigation and thus

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[4] 559 P.2d 118 (Alaska 1977).

[5] *Oliver Bagula v. Conam Constr. Co.*, AWCB Dec. No. 06-0297, 8 (November 7, 2006).

[6] *Id.* at 9.

[7] AS 23.30.125(c).

more deliberate investigation."[8] We agree that the appellants raised some serious questions making fair grounds for appeal of the board's decision. We need not address those grounds, nor how serious and doubtful the questions are, because we conclude, in the exercise of our independent judgment on a question of law under AS 23.30.128(b), that the availability of reimbursement under AS 23.30.155(d)[9] relieves the appellants from the possibility of irreparable damage.

Appellee Peak argues that it cannot be required by AS 23.30.155(d) to reimburse Conam beyond the amount that Peak would have been liable to Bagula had Conam prevailed before the board; Conam points to Peak's position as the reason it faces irreparable damage if required to comply with the board's order. The legal question presented to us is whether AS 23.30.155(d) reimbursement is capped at the amount owed by an earlier employer to the injured employee.

When we are asked what a statute requires, we look first to the plain meaning of the statute. If the statute is ambiguous, in the absence of Supreme Court guidance, we

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[8] *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992).

[9] AS 23.30.155(d) provided in 2003:

> If the employer controverts the right to compensation, the employer shall file with the board and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the board and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorneys' fees incurred by the prevailing employer, shall be made within 14 days of the determination.

turn to the language of the statute and the record of legislative intent to guide us, following the example of the Alaska Supreme Court, which "endeavors to give effect to legislative intent, with due consideration for the meaning that the language of the statute conveys to others."[10] When we are required to exercise our independent judgment pursuant to AS 23.30.128(b) to discern a rule not previously addressed by the Alaska Supreme Court or the Alaska State Legislature, we adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[11] In doing so, we draw on our collective experience and expertise to preserve the benefits, balance, and structural integrity of the Alaska workers' compensation system.

In this case, we are asked whether "any reimbursement required" means "any reimbursement required, not exceeding the amount that would have been owed by the earlier employer to the employee." Appellants and appellee Peak cited no Alaska Supreme Court decisions supporting Peak's interpretation of AS 23.30.155(d), and we found none directly on point. There are, however, solid structural reasons for interpreting AS 23.30.155(d) to reimburse the last employer fully, instead of to the limits of the earlier employer's liability to the employee.

First, AS 23.30.175(a) and (d) require the setting of the maximum weekly compensation rate at 120 percent of the state's average weekly wage, which is reset annually by the commissioner of the Alaska Department of Labor and Workforce Development. Since the calculation of the state average weekly wage varies from year to year, it is reasonable that the maximum compensation rate will also vary. In 2001, the state's average weekly wage was $659.47.[12] On December 1, 2005, the

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[10] *Rydwell v. Anchorage School Dist.,* 864 P.2d 526, 528 (Alaska 1993): *citing Forest v. Safeway Stores, Inc.,* 830 P.2d 778, 781 (Alaska 1992). We also attempt, so far as possible, to interpret each part or section of the workers' compensation statutes with every other part or section, so as to create a harmonious whole. *Id.*

[11] *Witbeck v. Superstructures, Inc.,* AWCAC Dec. No. 014, 13 n. 92 (July 13, 2006), *quoting Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[12] Bulletin 01-08, Dep't of Labor and Workforce Development, Dec. 15, 2001.

commissioner determined that the state's average weekly wage was $728.98.[13] The trend for the maximum compensation rate has been upward since enactment of the 2000 amendment returning the calculation of the maximum and minimum compensation rate to a percentage of the state's average weekly wage.[14] Maximum weekly compensation rates reflect an increase in average weekly wages, so that even sub-maximum compensation rates are likely to rise. Although average wages may fall in the future, if the upward trend continues, a later employer is likely to be subject to a higher compensation rate than the earlier employer.

Second, while workers' wages vary over workers' lifetimes, as a general rule, workers' hourly wage rates will tend to increase over the years.[15] The expectation that from year to year a worker's wages will at least vary is reflected in the methods used to calculate the individual worker's spendable weekly wages, the base wage rate on which

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[13] Bulletin 06-01, Dep't of Labor and Workforce Development, Jan. 6, 2006.

[14] §§ 15, 16 ch 106 SLA 2000. After the effective date of the amendment, July 1, 2000, the maximum weekly compensation rate rose to $762; in 2002 it was $791; in 2003 it was $814; in 2004 it was $832; in 2005 it was $848. *See* State of Alaska, Division of Workers' Compensation, Workers' Compensation - Weekly Compensation Rate Tables, http://www.labor.state.ak.us/wc/rate.htm (last viewed Jan. 2, 2007).

[15] U.S. Department of Labor, Bureau of Labor Statistics, National Longitudinal Surveys, Economic News Release No. 06-1496, NUMBER OF JOBS HELD, LABOR MARKET ACTIVITY, AND EARNINGS GROWTH AMONG THE YOUNGEST BABY BOOMERS: RESULTS FROM A LONGITUDINAL SURVEY (August 26, 2005), *available at* http://www.bls.gov/nls/home.htm.

> The inflation-adjusted earnings of workers increased most rapidly while they were young. Hourly earnings grew by an average of 6.3 percent per year from ages 18 to 21 and 6.5 percent per year from ages 22 to 25. The earnings growth rate slowed to 4.0 percent annually from age 26 to age 30, then to 3.6 percent annually from age 31 to age 35. From ages 36 to 40, hourly earnings grew an average of 2.5 percent per year.

Available at http://www.bls.gov/news.release/nlsoy.nr0.htm (last viewed Jan. 2, 2007). For an example of the variation over a lifetime, see *Peck v. Alaska Aeronautical, Inc.*, 744 P.2d 663 (Alaska 1987).

the worker's compensation is based.[16] The statutory construction of our compensation system reflects that wage variance is the norm rather than the exception.

Third, we believe that the legislature did not intend to cap reimbursement. The amendment providing reimbursement to the later employer in the last sentence of AS 23.30.155(d) was enacted in 1988,[17] at the same time that AS 23.30.175(a) was amended to provide a fixed maximum weekly compensation rate of $700[18] after years of floating maximum compensation rates tied to the average weekly wage.[19] However, we do not infer that any cap on § 155(d) reimbursement was intended by the legislature in 1988, because anticipated variation in wages over a work life was reflected in the contemporaneous amendment of AS 23.30.220.[20] Instead, the statute requires that "*any* reimbursement *required*, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer," be paid by the employer who did not prevail. The statute clearly provides that the board may require *any* reimbursement, (with interest and attorney fees incurred defending the claim), to be paid to the prevailing last employer, so that the last employer suffers no financial loss as a result of having made payments to the employee that ultimately the last employer did not owe. We understand "any reimbursement" to include "full reimbursement" as well as "partial reimbursement." Thus, although the last employer or insurer who "may be responsible" is required to make the payments initially, the earlier employer, who seeks to shift responsibility to the later employer, bears the risk of overpayment due to a higher compensation rate.[21]

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16 AS 23.30.220.

17 § 25 ch 79 SLA 1988.

18 § 30 ch 79 SLA 1988.

19 *See, e.g.,* § 2 ch 83 SLA 175.

20 § 37 ch 79 1988.

21 The last employer's compensation rate is necessarily based on the employee's most recent earnings, AS 23.30.220(a), which are more likely to match the employee's current, instead of historical, wage earning abilities. *See, Circle De Lumber*

AS 23.30.220(d) was enacted as part of CSSB322, a package of workers' compensation reforms drafted by a Labor Management Task Force. Minutes of the House Judiciary Committee for April 6, 1988, reflect the importance assigned to this provision by the Task Force:

> Mr. Anders continued by discussing the basic pros and cons of the bill. He first addressed benefits in general. The bill provides a number of benefits to injured workers which they presently don't have. One area where labor was very strong about changing had to do with payment under reservation of rights. Employers argue over who is responsible for workers' injuries, the last employer or the one before that, and employees can go for months without any benefits at all while this is being disputed. The bill provides for payment to the worker by the last employer until the dispute is resolved, which is a major benefit to the worker.[22]

AS 23.30.155(d) mandated payments, with reimbursement available to the last employer, was designed as an employee benefit.[23] In our view, the efficiency of the benefit is lost if the last employer is encouraged to controvert on other grounds, or to resist the mandate to make payment until the intra-employer dispute is resolved, by the prospect of certain financial harm, win or lose.

Co. v. Humphrey, 130 P.3d 941 (Alaska 2006). If the employee earned higher wages in the earlier former employment, the compensation rate paid by the last employer will be lower; the employee bears the risk that the initial compensation paid by the last employer may be based on lower wages than were earned in the earlier employment.

[22] Testimony of Bob Anders, Labor Member of Labor Management Task Force, Hearing on SB 322 before the H. Judiciary Comm., 15th Alaska State Legis. (April 6, 1988).

[23] In some other states, reimbursement from the earlier employer is, or was, available, but expressly limited to the earlier employer's proportionate allocation of liability. *See, e.g.,* C.G.S.A. §31-299(b) (Conn. 2006); N.Y. Workers' Compensation Law § 49-ee (1980) *repealed* L. 1984 c. 699 § 3 (eff. Jan. 1, 1985); Vt. State. Ann. tit. 21, § 662 (2005). Also, we do not consider this statute to be a subrogation statute, because the last employer may not exercise the rights of the earlier employer against the employee during the period the last employer pays compensation.

We note the Supreme Court's decision in *Bouse v. Fireman's Fund Ins. Co.*[24] presents another difficult issue respecting AS 23.30.155(d). In that case, the Court stated that the "final determination" referred to in AS 23.30.155(d) means the board's final determination, not the court's decision on appeal. For that reason, the court held, the appellant employer may not be entitled to a full award of attorney fees by the court on appeal. The implication of the court's reasoning is that the prevailing employer at the board level may receive a *full* award of attorney fees. We see nothing in *Bouse* that limits the board's ability to award a *full* reimbursement under AS 23.30.155(d) if the appellant is successful before this commission and this appeal is remanded to the board for further proceedings.

Conclusion.

Because AS 23.30.155(d) provides a source of reimbursement of payment with interest if Conam is required to make under the board's order, in the event Conam is successful on appeal, we find Conam has not demonstrated irreparable harm. We therefore DENY the appellants' motion for limited stay pending appeal.

Date: *9 January 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Chris N. Johansen, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[24] 932 P.2d 222 (Alaska 1997).

APPEAL PROCEDURES

This is a not a final commission decision on this appeal from the board's decision and order. However, it is a final decision on whether the appellant is entitled to a stay of the board's order of payment pending the appeal. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing 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. AS 23.30.129. Because this is not a final decision on the merits of this appeal, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rule 402 or a petition for hearing. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

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).

If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

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.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision on Limited Motion for Stay of Order to Pay Pending Appeal, AWCAC Dec. No. 024, in the matter of Conam Constr. Co. and ACE USA Ins. Co. v. Oliver Bagula, Peak

Oilfield Services, and Alaska Ins. Guar. Ass'n; AWCAC Appeal No. 06-034, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 9th day of January, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No.06-028 was mailed on *1/9/07* to McKeever, Heikes, & MacMillan at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, McKeever, Heikes & MacMillan.

Signed *1/9/07*
L. Beard, Deputy Clerk Date