

**Case:** *Harnish Group, Inc., d/b/a N-C Machinery Company, and Alaska National Insurance Company vs. Jerry D. Moore*, Alaska Workers' Comp. App. Comm'n Dec. No. 095 (December 24, 2008)

**Facts:** Jerry Moore (Moore) injured his back at work in 2001 and the employer paid workers' compensation benefits. In 2002, he was found eligible for reemployment benefits. In January or February 2003, Moore hired attorney Robert Beconovich. There were no hearings held on reemployment benefits and no medical summaries filed by Beconovich were in the record. In January 2004, the parties signed off on a reemployment plan but around the same time the insurance adjuster converted Moore's benefits to permanent total disability (PTD). Beconovich filed a claim on Moore's behalf in early February 2004. The employer admitted liability for PTD in its answer to the claim but denied liability for attorney fees. No fee affidavit was filed. At hearing the sole issue was attorney's fees. The board awarded fees under AS 23.30.145(a), concluding that the employer's insurer's resistance constituted a "controversion in fact."

The superior court upheld the fee award. The Alaska Supreme Court (supreme court) reversed on the grounds that fees under AS 23.30.145(a) were improper without a controversion in law or fact. The supreme court concluded that the actions identified as resistance could not constitute a controversion in fact because they occurred before Moore filed a claim. However, the supreme court found that the board's findings regarding resistance to paying PTD by continuing in a seemingly futile reemployment planning process would support an award of fees under AS 23.30.145(b) and remanded for the board to calculate fees under that subsection.

On remand, the board set the fee at \$10,000. The board noted that no affidavit of attorney time was filed, but waived the requirement to avoid "manifest injustice." The board stated that Beconovich testified that the fee records no longer existed, that he believed the fee should be between \$7,500 and \$12,000 and that he currently bills \$250/hour. The board also stated that at that billing rate, \$10,000 would equal 30 to 48 hours of billable work and that was a reasonable amount of hours spent on the work he did for Moore.

The employer appealed to the commission, arguing substantial evidence did not support the fee award. Beconovich argued that the commission lacked jurisdiction and that the fee award was fair.

**Applicable law:** AS 23.30.145(b) states in part that the board "shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees."

8 AAC 45.180(d) provides:

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 45.195 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.

**Issues:** Does the commission have jurisdiction over the appeal since the fees were awarded after the appeals to the superior and supreme courts? Does substantial evidence support the attorney fee award? Did the board err in excusing the attorney's noncompliance with 8 AAC 45.180(d)?

**Holding/analysis:** The commission concluded that it could exercise jurisdiction, because:

(1) The superior court did not retain explicit or implicit jurisdiction and no proceedings were pending before it. This was not a case where the superior court's remand to the board was followed by an appeal to the commission; instead, the superior court affirmed the board and did not remand, and the supreme court reversed and remanded.

(2) The commission's exercise of jurisdiction would not interfere with the supreme court's jurisdiction since the supreme court can correct any misunderstandings on appeal and the commission must follow the supreme court's rulings.

(3) Since Moore did not request removal to the superior court and since the timeframe for appealing to that court had passed, if the commission declined to exercise jurisdiction, it would deny the employer any way to file an appeal.

The commission concluded that the board lacked substantial evidence to support its fee award because:

(1) The board lacked substantial evidence to excuse the attorney from providing any evidence of his actual work performed. Even if the fee records had been destroyed, the attorney could look at his scanned case file and provide an estimate of his actual work performed based on the file. The requirement to file an affidavit was procedural in terms of timing and form but substantive as well because 8 AAC 45.180(d) specifically mentions it as among the evidence the board should consider when setting a fee award “reasonably commensurate with *the actual work performed.*” Thus, the board could not excuse “a failure to submit *any* evidence in support of the claim for fees . . . reasonable . . . cannot be a number plucked from the air.” Dec. No. 095 at 17. (The commission did not consider whether the failure to file an affidavit disqualified the attorney from a fee award because the supreme court order on remand concluded that Moore was entitled to fees under AS 23.30.145(b).)

(2) 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 based this solely by dividing the \$10,000 award by the \$250 hourly rate; “the decision contained no discussion of the nature, length and complexity of Beconovich’s services and no findings as to what those services were.” Dec. No. 095 at 21.

(3) The board lacked substantial evidence to support an hourly rate of \$250 for work performed in 2003. Beconovich testified that was his current rate, but another board decision in early 2004 indicated that \$175/hour was a reasonable rate for Beconovich. Moreover that case had three contested issues and went to hearing with three fact witnesses and Beconovich billed 34.9 hours.

Moreover, Beconovich’s testimony about “a case of comparable complexity” did not support the fee award because his range of \$7,500 to \$12,000 appeared to be based on cases that go to hearing (and there was no hearing on PTD in Moore’s case) and he characterized the range as the “board award in a standard case” and he did not actually state that the fees in Moore’s case should be in that range. The commission concluded that while the board may base a fee award on comparable cases, “[t]he 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.” Dec. No. 095 at 20.

The commission remanded to the board for rehearing to calculate the fee.