

**Case:** *Kennecott Greens Creek Mining Co. and Sedgewick Claims Management Services, Inc. vs. Raymond Clark and State of Alaska, Second Injury Fund, Alaska Workers' Comp. App. Comm'n Dec. No. 080 (June 9, 2008)*

**Facts:** Clark injured his back over time working as an underground mechanic for the employer; he had back surgery in 2002. At that time, he waived his right to reemployment benefits because he was released to return to work with a 50-pound lifting restriction. He was paid permanent partial disability compensation based on an impairment rating of 17 percent. Clark resumed working as an underground mechanic for the employer until March 2004, when he suffered severe back pain. In April 2005, he was released to return to light-duty work and began retraining as a process control operator. He received an increased impairment rating to 20 percent. The employer paid benefits but sought reimbursement from the second injury fund (Fund). The board decided that the employer would be entitled to reimbursement because Clark suffered a second injury that combined with his first injury but that the Fund was not liable for funds paid under AS 23.30.041(k) (reemployment benefits). The board thus denied the petition for reimbursement because, taking out the .041(k) benefits, the employer had not paid 104 weeks of qualifying compensation. The board concluded that attorney fees could be awarded against the Fund but did not do so since the employer did not prevail. The employer appealed, seeking reimbursement and attorney fees. The Fund cross-appealed, arguing the board erred in deciding there was second injury and in failing to determine whether Clark's disability was substantially greater as a result of the second injury, as well as asserting it was not liable for attorney fees. Clark cross-appealed, arguing he was entitled to attorney fees against the Fund.

**Applicable law:** AS 23.30.205 provides in pertinent part:

(a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

AS 23.30.120(a), presumption of compensability, and related case law.

When Clark was injured in 2004, AS 23.30.041(k) provided in relevant part:

Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease and permanent impairment benefits shall then be paid at the

employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment plan, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the plan, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the plan to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. . . .

When Clark was injured in 2004, AS 23.30.395(8) defined compensation as "the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter."

AS 23.30.145 provides in relevant part

(a) . . . . When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; . . . . When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. . . .

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. . . .

**Issues:** Did the board have substantial evidence, and use the correct legal analysis, to determine that the employer satisfied the requirements for reimbursement under AS 23.30.205? Does AS 23.30.205 require reimbursement of benefits paid under AS 23.30.041(k)? May the board award attorney fees against the Fund?

**Holdings/analysis:** Presumption of compensability, AS 23.30.120(a), does not apply to an employer's request for reimbursement from the Fund. Employer does not need

presumption because it has access to information and discretion to decide how to handle a claim. Moreover, a presumption of reimbursement would expand the Fund's liability and strain its limited resources. Even if the presumption did apply, the board erred by (1) requiring the employer to rebut the presumption, when the Fund would have the burden to do so in this context and (2) making credibility determinations when considering whether the presumption was rebutted. In deciding whether the presumption attached and is rebutted, the evidence in each of these steps is assumed to be true and viewed in isolation. Only after the presumption drops out is evidence weighed, compared and assessed for credibility.

The commission remanded to the board because it did not make all the required findings of fact. The board did decide there was a second injury and that this injury combined with the first to increase Clark's permanent impairment and to lose his ability to do heavy work. But the board failed to determine whether the employer's liability to Clark is substantially greater as a result of the combined effects of the injury and pre-existing impairment or aggravation of the pre-existing impairment than the employer's liability would have been as a result of the second injury alone. The board needed to establish the value of the employer's liability for the subsequent injury alone and determine the value of the liability for the combined effects of both and then compare the two values to determine if the combined effects are "substantially greater" than the subsequent injury alone.

The Fund argued that reemployment benefits were not reimbursable because employers are not required to pay into the SIF funds for reemployment benefits under *Providence Washington Ins. Co. v. Busby*. 721 P.2d 1151 (Alaska 1986). The commission distinguished *Busby* because it was decided based on a different version of AS 23.30.041 and even then it did not preclude reimbursement of compensation paid while an employee was engaged in a vocational rehabilitation plan. Under that version of the statute, the Fund reimbursed compensation paid under the former AS 23.30.041(g). Moreover, payments for permanent partial impairment (PPI) may be reimbursed, even though PPI is not calculated by weeks of disability or always paid in weekly installments. Thus, the commission held that "all compensation" in AS 23.30.205(a) includes "compensation" paid under AS 23.30.041(k). However, reimbursement may not be made until 104 weeks of disability have been proved. (Disability is defined in terms of "incapacity to earn . . . wages" instead of physical impairment. AS 23.30.395(16).)

Attorney fees are not payable under AS 23.30.145(a) against the Fund because that subsection explicitly permits only fee awards that are paid by the employer or insurer. Fees are not payable under AS 23.30.145(b) because such awards are payable after a condition that can only be triggered by an employer and it would be illogical "to condition an employer's right to attorney fees against the Fund with the employer's failure to timely controvert or resistance to payment of compensation due to the employee." Dec. 080 at 25. The commission noted that attorney fees may be awarded to or against the Fund by the commission per AS 23.30.008(d) or by the courts per

AS 23.30.145(c) and *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 596-97 (Alaska 1996).