Alaska Workers' Compensation Appeals Commission

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Kiel L. Cavitt,	Final Decision	
Appellant,	Decision No. 248	May 4, 2018
VS.		
D&D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company,	AWCAC Appeal No. 17-017 AWCB Decision No. 17-0109	
Appellees.	AWCB Case No. 201513001	

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0109, issued at Anchorage, Alaska, on September 13, 2017, by southcentral panel members Ronald P. Ringel, Chair, and Stacy Allen, Member for Labor.

Appearances: Keenan Powell for appellant, Kiel L. Cavitt; Stacey C. Stone, Holmes Weddle & Barcott, PC, for appellees, D&D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company.

Commission proceedings: Appeal filed September 26, 2017; briefing completed February 2, 2018; oral argument was not requested.

Commissioners: James N. Rhodes, S. T. Hagedorn, and Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Kiel L. Cavitt (Mr. Cavitt) sustained an injury while working for D&D Services, LLC d/b/a Novus Auto Glass, insured by Ohio Casualty Insurance Company (D&D). The Alaska Workers' Compensation Board (Board) heard Mr. Cavitt's claim on August 2, 2017, in Anchorage, Alaska,¹ and granted his request for an order confirming his entitlement to temporary total disability (TTD) benefits. The Board denied his claims for a compensation rate adjustment and a finding of frivolous and unfair controversion; further, the Board awarded him interest on late-paid benefits, but denied him a penalty. His claim for

¹ Cavitt v. D&D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company, Alaska Workers' Comp. Bd. Dec. No. 17-0109 (Sept. 13, 2017) (Cavitt).

attorney fees was granted, however, at a reduced amount. Mr. Cavitt timely filed his appeal with the Alaska Workers' Compensation Appeals Commission (Commission). Since neither party requested oral argument, the Commission decides this appeal based on the briefing submitted by the parties. The Commission now affirms the Board's decision in part and remands in part.

2. Factual background and proceedings.²

Mr. Cavitt worked for D&D as a glazier. On August 14, 2015, while working on scaffolding replacing the windshield in a motorhome, Mr. Cavitt fell from the scaffolding and injured his right elbow.³ He was taken to the emergency room, where the doctors diagnosed a comminuted fracture of the proximal radius with displaced fragments.⁴ On August 15, 2015, Kenneth C. Thomas, M.D., performed open reduction and internal fixation surgery, with a radial head arthroplasty and ligament repair.⁵

Since Mr. Cavitt was unable to return to his job at the time of injury for more than 90 days, an eligibility evaluation for reemployment benefits was started on December 21, 2015.⁶ On December 29, 2015, Dr. Thomas declared Mr. Cavitt to be medically stable and released him to light-duty work.⁷ However, Mr. Cavitt was unable to return to work with D&D, and on January 5, 2016, he began working as a pizza delivery driver.⁸

D&D discontinued TTD and began paying permanent partial impairment (PPI) benefits on a biweekly basis on January 29, 2016, because Mr. Cavitt was medically stable, but was still in the reemployment process.⁹ On February 1, 2016, Mr. Cavitt

- ⁵ *Id.*, No. 3.
- ⁶ *Id.*, No. 4.
- ⁷ *Id.*, No. 5.
- ⁸ *Id.*, No. 6.
- ⁹ *Id.*, No. 7.

² We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

³ *Cavitt* at 2, No. 1.

⁴ *Id.* at 3, No. 2.

received a seven percent PPI rating based on the injury.¹⁰ He was found ineligible for reemployment benefits on March 8, 2016, because he was able to work as a pizza delivery driver.¹¹ On April 26, 2016, D&D paid Mr. Cavitt the balance of his seven percent PPI rating in a lump sum.¹²

On May 11, 2016, Mr. Cavitt filed a claim seeking PPI, penalty for late-paid PPI, interest, and attorney fees and costs.¹³ At the time of the hearing on July 20, 2016, on Mr. Cavitt's May 11, 2016, claim, the parties reached a stipulation on the issues in dispute. Specifically, the parties agreed Mr. Cavitt was injured in the course and scope of his employment with D&D, PPI was paid late, and Mr. Cavitt was entitled to a penalty. The parties also stipulated D&D would pay \$4,800.00 in attorney fees and costs.¹⁴

On August 16, 2016, Mr. Cavitt reported to Dr. Thomas he had developed shooting pains in his right forearm, and Dr. Thomas was concerned about possible nerve entrapment. He then referred Mr. Cavitt to Jared Kirkham, M.D., for nerve conduction studies.¹⁵ On August 17, 2016, Dr. Kirkham performed the nerve conduction studies, which were within normal limits. However, he opined it was not unusual for someone to have persistent neuropathic pain of unclear origin after a *traumatic injury*.¹⁶

On December 5, 2016, Mr. Cavitt saw PA-C Kristin Fredley, who noted a fresh abrasion on Mr. Cavitt's right elbow, and he reported he had fallen after being hit by a car.¹⁷

¹³ *Id.*, No. 11.

¹⁴ *Id.*, No. 12 (apparently no Decision and Order was issued since the parties reached a stipulation resolving all issues. At least, no Decision and Order was found on the Board's website).

- ¹⁵ *Id.* at 4, No. 13.
- ¹⁶ *Id.*, No. 14 (emphasis added).
- ¹⁷ *Id.*, No. 15.

¹⁰ *Cavitt* at 3, No. 8.

¹¹ *Id.*, No. 9.

¹² *Id.*, No. 10.

In mid-February 2017, Mr. Cavitt fell on an icy sidewalk while delivering pizza.¹⁸ On March 1, 2017, Mr. Cavitt reported to Dr. Kirkham his pain worsened after the fall approximately two weeks earlier. Dr. Kirkham ordered a CT scan of Mr. Cavitt's right elbow.¹⁹ On March 8, 2017, PA-C Fredley reviewed the CT scan and determined there had been either chronic or posttraumatic loosening of the prosthesis with "likely posttraumatic changes."²⁰ On March 10, 2017, Dr. Kirkham took Mr. Cavitt off work until March 14, 2017, and on March 15, 2017, he extended that restriction until April 15, 2017.²¹

On March 15, 2017, Dr. Kirkham also noted that the CT scan showed loosening of the prosthesis that was due to:

Acute-on-chronic right elbow pain status post right elbow fracture and dislocation from work injury on August 14, 2015, and right coronoid ORIF and radial head arthroplasty on August 15, 2016 [sic 2015]. This is likely related to posttraumatic loosening of the radial head prosthesis on top of his underlying right neuropathic right elbow pain of unclear etiology.²²

On March 15, 2017, Mr. Cavitt filed a claim seeking TTD beginning March 15, 2017, and later amended it to change the date to March 10, 2017. Mr. Cavitt also sought an increase in his compensation rate and attorney fees and costs.²³

On April 5, 2017, D&D filed an answer to Mr. Cavitt's March 15, 2017, claim and filed a controversion notice. D&D contended there was no medical evidence connecting Mr. Cavitt's disability to the August 2015 work injury, and noted there might have been a superseding or intervening event. D&D also denied Mr. Cavitt was entitled to a compensation rate increase.²⁴

- ²⁰ *Id.*, No. 18.
- ²¹ *Id.*, No. 19.
- ²² *Id.*, No. 20.
- ²³ *Id.* at 4-5, No. 21.
- ²⁴ *Id.* at 5, No. 22.

¹⁸ *Cavitt* at 4, No. 16.

¹⁹ *Id.*, No. 17.

On April 7, 2017, Mr. Cavitt amended his March 15, 2017, claim to include medical costs.²⁵ On April 26, 2017, Mr. Cavitt saw R. David Bauer, M.D., for an employer's medical evaluation (EME). Dr. Bauer concluded the most significant cause in bringing about Mr. Cavitt's current need for medical treatment was the 2015 work incident, and neither the motor vehicle accident nor the February fall were substantial causes. Dr. Bauer stated Mr. Cavitt required revision surgery for the prosthesis and was not medically stable. He predicted Mr. Cavitt would be medically stable within nine months of the surgery, and Mr. Cavitt should be restricted to light-duty work until he became medically stable.²⁶

On April 28, 2017, D&D filed another controversion in response to Mr. Cavitt's April 7, 2017, amended claim.²⁷ D&D acknowledged that medical reports showed Mr. Cavitt was unable to work, but stated it was not clear the cause was the August 2015 injury. D&D noted Mr. Cavitt was working for another employer at the time of his February 2017 fall.

On May 5, 2017, D&D received Dr. Bauer's EME report, and on May 15, 2017, D&D began paying benefits, including TTD retroactive to March 10, 2017.²⁸

On May 31, 2017, at the prehearing conference, a hearing was scheduled on Mr. Cavitt's claims.²⁹

On June 29, 2017, Dr. Bauer responded to questions from D&D's attorney, and opined Mr. Cavitt was medically stable until such time as he pursued the revision surgery. Dr. Bauer also stated Mr. Cavitt would become medically stable either 90 or 180 days after the surgery, depending on what procedure was done. He also stated Mr. Cavitt was capable of medium-duty work.³⁰

 27 D&D stated it had not received Dr. Bauer's report at the time it filed its controversion. Hr'g Tr. at 26:17 – 27:10, Aug. 2, 2017.

²⁸ *Cavitt* at 5, No. 26.

²⁹ *Id.*, No. 27.

³⁰ *Id.*, No. 28.

²⁵ *Cavitt* at 5, No. 23.

²⁶ *Id.*, No. 24.

On July 7, 2017, D&D controverted TTD after March 15, 2017, based on Dr. Bauer's June 29, 2017, supplemental report.³¹

Mr. Cavitt underwent surgery on July 11, 2017, to revise the prosthesis and remove plates.³² On July 11, 2017, Mr. Cavitt filed a claim alleging D&D had failed to pay for prescription medication and alleging D&D's July 7, 2017, controversion was unfair or frivolous.³³ This claim was not considered at the August 2, 2017, hearing.³⁴

There is no evidence in the file as to Mr. Cavitt's wages in the two calendar years preceding the August 2015 injury, but his compensation rate was calculated to be \$273.28 per week.³⁵ Based on that rate, by working backward through the 2015 rate table, the conclusion was that Mr. Cavitt's gross weekly wage was approximately \$407.00, for annual earnings of \$21,164.00.³⁶

Mr. Cavitt testified that while working for D&D he was paid \$13.00 per hour, but he had been accepted into an electrician apprenticeship program in which he would have begun earning \$19.00 per hour, increasing to \$34.00 per hour over four years.³⁷ However, no evidence of his acceptance into this program or the length of time for the program was presented.³⁸

In his work delivering pizza, Mr. Cavitt earned \$33,999.03 in 2016.³⁹ Based on those earnings, Mr. Cavitt calculated his compensation rate should be \$429.58.⁴⁰

³⁴ *Id.*

³⁵ *Id.* at 32. D&D stated it used Mr. Cavitt's 2014 income tax return to calculate the compensation rate. Hr'g Tr. at 26:9-12. There is no compensation report in the record to the Commission.

- ³⁶ *Id.*, No. 32.
- ³⁷ *Id.*, No. 33.
- ³⁸ Record as a whole.
- ³⁹ *Id.*, No. 34.
- ⁴⁰ *Id.*

³¹ *Cavitt* at 6, No. 29.

³² *Id.*, No. 30.

³³ *Id.*, No. 31.

Mr. Cavitt filed an attorney fee affidavit detailing fees of \$8,654.50 and costs of \$264.26 since March 15, 2017.⁴¹ At hearing, Mr. Cavitt's attorney stated that since the date of the fee affidavit she had incurred additional fees of \$2,068.00 and costs of \$11.42, for total fees of \$10,722.50 and total costs of \$275.68.⁴²

Mr. Cavitt's July 21, 2017, attorney fee affidavit showed he did not receive notice of the fact that D&D began paying benefits on May 15, 2017, until May 22, 2017. Prior to that date, he had incurred \$3,650.00 in fees. Additionally, the fee affidavit included several entries that appeared to relate to the July 11, 2017, claim which was settled by stipulation.⁴³

Payment for benefits prior to Mr. Cavitt's mid-February 2017 fall were not in dispute.⁴⁴ The issues in dispute for the August 2017 hearing were penalties and interest on late-paid benefits, a compensation rate adjustment, and attorney fees and costs incurred after the stipulation on July 20, 2016. The Board denied Mr. Cavitt's request for a compensation rate adjustment and his claim for a penalty for an unfair and frivolous controversion.⁴⁵ Mr. Cavitt timely appealed this decision, contending the Board erred in denying a compensation rate adjustment and the original compensation rate was unfair. Mr. Cavitt also contended on appeal that the Board erred in finding that the controversion was in good faith, contending he should have been awarded a penalty on late-paid TTD from March 10, 2017, to May 15, 2017. Mr. Cavitt also contended he should have been awarded full attorney fees.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.⁴⁶

- ⁴³ *Id.*, No. 36.
- ⁴⁴ *Id.*, No. 37.
- ⁴⁵ *Id.* at 20.
- ⁴⁶ AS 23.30.128(b).

⁴¹ *Cavitt* at 6, No. 35.

⁴² *Id.*

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁴⁷ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁴⁸ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁴⁹ The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.⁵⁰

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁵¹ The Commission, when interpreting a statute, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."⁵²

- 4. Discussion.
 - a. The Board's finding that Mr. Cavitt is not entitled to a compensation rate adjustment is correct.

AS 23.30.220 governs computation of an injured workers' compensation rate and states "[c]omputation of compensation under this chapter **shall** be on the basis of an employee's spendable weekly wage **at the time of injury**."⁵³ D&D based Mr. Cavitt's

- ⁵⁰ AS 23.30.128(b); AS 23.30.122.
- ⁵¹ AS 23.30.128(b).
- ⁵² *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).
- ⁵³ AS 23.30.220(a) (Emphasis added).

⁴⁷ See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd., 880 P.2d 1051, 1054 (Alaska 1994).

⁴⁸ *McGahuey v. Whitestone Logging, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-89 (Alaska 1984).

⁴⁹ AS 23.30.122.

compensation rate on his earnings at the time of injury.⁵⁴ Although subsequent periods of disability occurred after he went to work as a pizza delivery driver earning a higher wage, the Alaska Workers' Compensation Act (Act) does not provide a mechanism for changing a compensation rate (except in cases of permanent total disability) after the rate has been established.

Mr. Cavitt relies on several Alaska Supreme Court (Court) and Commission decisions in support of his contention that his compensation rate should be adjusted due to his increased post-injury income for his subsequent period of disability. Unfortunately, this reliance is misplaced. In *Johnson v. RCA-OMS, Inc.*, 681 P.2d 905 (Alaska 1984), the Court considered the earnings of the employee at the time of injury and determined these were a fairer reflection of his loss during his period of disability than his previous substantially higher earnings prior to his partial retirement. Here, Mr. Cavitt's actual earnings at the time of injury in 2014 were used to calculate his compensation rate pursuant to AS 23.30.220(a).⁵⁵ Mr. Cavitt has not argued this rate was incorrect at the time of injury, but rather his subsequent increase in earnings should be used to recalculate his compensation rate, because the original compensation rate is no longer indicative of his earning capacity into his future periods of disability and, thus, is unfair.

Mr. Cavitt did make a contention that since he had been accepted to start an apprenticeship to become an electrician after the date of his injury at a higher hourly rate than he was earning at the time of injury, his compensation rate at the time of injury should have included the prospective increase in income. However, he did not start the program and no evidence was presented to show he would have started the program absent his work injury.⁵⁶ Unlike in *Straight*⁵⁷ or *Johnson*, for Mr. Cavitt the best evidence

⁵⁴ As noted above, there is no copy of any compensation report in the record submitted to the Commission from the Board, so the Commission relies on the parties' statements as to the basis for the compensation rate. *See*, Hr'g Tr. at 7:16 – 8:3.

⁵⁵ *Id.*

⁵⁶ Record as a whole.

⁵⁷ *Straight v. Johnston Constr. & Roofing, LLC*, Alaska Workers' Comp. App. Comm'n Dec. No. 231 (Nov. 22, 2016).

of his probable earnings during his temporary disability following the first surgery was the evidence of his actual earnings in the year preceding the date of injury. The Board noted Mr. Cavitt did not "dispute his spendable weekly wage was properly calculated under AS 23.30.220(a)(4)" at the time of injury.⁵⁸ According to Mr. Cavitt, the compensation rate only became grossly unfair when he was able to earn more money post-injury and between the two periods of disability.

Likewise, *Brunke v. Rogers & Babler* does not mandate a change in Mr. Cavitt's compensation rate.⁵⁹ In *Brunke*, the Court required the Board to use its discretion provided in AS 23.30.220, as it then existed, to determine a fair compensation rate. First, there was no longer a discretionary provision in AS 23.30.220 at the time of Mr. Cavitt's injury and the fairness doctrine of AS 23.30.001 does not require a rate calculation here. In *Straight*, the question involved under which section of AS 23.30.220 should an employee's compensation rate be determined when the employee had been largely out of the labor market in the two years prior to the work injury.⁶⁰ Using AS 23.30.220(a)(4) may have not been an accurate method for calculating Mr. Straight's compensation rate. However, this is not the situation here, where Mr. Cavitt's earnings in the year prior to injury were used to calculate his compensation rate and he asked for a rate increase only because his post-injury earnings were greater than his earnings at the time of injury. At the time of injury, the best predictor of his earnings capacity during periods of disability were his earnings in the year prior to injury.

D&D properly calculated Mr. Cavitt's compensation rate at the time of his injury pursuant to AS 23.30.220(a)(4), which states "if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee[.]" D&D used

⁵⁸ *Cavitt* at 17.

⁵⁹ Brunke v. Rogers & Babler, 714 P.2d 795 (Alaska 1986).

⁶⁰ Straight.

Mr. Cavitt's 2014 income tax return for calculating his compensation rate under AS 23.30.220(a)(4). Mr. Cavitt, as noted above, conceded the rate was largely fair to him at the time of injury, but argues it became unfair when he was able to find work at a higher wage post-injury. Mr. Cavitt did suggest his potential prospective earnings in the electrician apprenticeship program should have been included, but he presented no substantial evidence of his acceptance into the program nor any evidence that the use of his 2014 income tax return was grossly unfair to him.

The real issue in dispute is that Mr. Cavitt is in the unfortunate position of earning more post-injury than he did at the time of his original injury. He contends he should be entitled to a revised compensation rate based on his increased earnings post-injury for any subsequent periods of disability arising out of the original injury. AS 23.30.220(a) quite clearly states that "[c]omputation of compensation . . . shall be on the basis of an employee's spendable weekly wage at *the time of injury* (stress added)." This language is binding for determining an injured worker's compensation rate.

The Act does provide two mechanisms, and only two, for changing an injured worker's compensation rate after it has been established. One provision in the Act for revising a compensation rate is when an injured worker becomes permanently disabled. AS 23.30.220(a)(10) allows the Board to determine an injured employee's gross weekly earnings "by considering the nature of the employee's work, work history, and resulting disability" as long as the compensation calculated does not exceed the "employee's gross weekly earnings at the time of injury."⁶¹ The other provision is found at AS 23.30.175, which provides for an adjustment to a compensation rate when an injured worker is "not residing in the state at the time compensation benefits are payable."⁶² These are the only two adjustments to an injured worker's compensation rate allowed by the Act, once the compensation rate has been properly established.

Since the Act does not contain a provision for reevaluating an employee's compensation rate during periods of disability, the rate must stay as it was calculated at

⁶¹ AS 23.30.220(a)(10).

⁶² AS 23.30.175(b).

the time of injury. It is not within the jurisdiction of the Commission to rewrite the Act by adding new provisions. If the Legislature wishes to remedy this possible inequity in the Act, it is up to the Legislature, and not the Commission, to add a new provision to the Act. Moreover, calculating an employee's compensation rate "on the basis of an employee's spendable weekly wage *at the time of injury*" furthers the Act's mandate that it be "interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity . . . benefits to injured workers at a reasonable cost to the employers "⁶³ The Board's finding that the compensation rate should not be adjusted is affirmed as supported by substantial evidence in the record as a whole and by the plain language of AS 23.30.220(a).

b. D&D's controversion was not in bad faith.

The Board is the finder of fact and the Board's findings of fact are conclusive even if susceptible to contrary conclusions.

The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.⁶⁴

The Court, on several occasions, has iterated that the weight given to medical reports, "even if the evidence is conflicting or susceptible to contrary conclusions" is within the Board's exclusive power.⁶⁵

Here, D&D controverted ongoing benefits based on Dr. Kirkham's report, on March 15, 2017, that Mr. Cavitt's acute-on-chronic right elbow pain was "likely related to post-traumatic loosening of the radial head prosthesis on top of his underlying right neuropathic right elbow pain of unclear etiology."⁶⁶ The Board interpreted the post-

⁶⁶ *Cavitt* at 4, No. 20.

⁶³ AS 23.30.220(a)(emphasis added); AS 23.30.001(1).

⁶⁴ AS 23.30.122.

⁶⁵ Brown v. Patriot Maint., Inc., 99 P.3 544, 548 (Alaska 2004)(citing Safeway, Inc. v. Mackey, 965 P.2d 22, 28 (Alaska 1998).

traumatic language, as had the adjuster, to refer either to Mr. Cavitt having been hit by an automobile in December 2016, or to his slip and fall while delivering pizza in February 2017, or to the effects of both incidents.⁶⁷ The Board came to this conclusion in spite of the fact that Mr. Cavitt had been to see Dr. Kirkham as early as August 2016 about ongoing pain complaints in his right elbow. The Board concluded this interpretation did not support a finding the controversion was in bad faith.

The Commission questions whether ambiguous medical reports are or should be a sufficient basis for controverting benefits, and posit that a prudent adjuster would have called Dr. Kirkham to clarify his language before controverting benefits. Nonetheless, the medical reports, without additional information, were susceptible to two interpretations: (1) post traumatic changes as a result of the original surgery, or (2) post traumatic changes as a result of the slip and fall while delivering pizza. The Board and the adjuster chose the latter interpretation, which in hindsight was incorrect as D&D's own EME report by Dr. Bauer stated the loosening of the prosthesis and need for surgery were the result of the work injury.

Nonetheless, the Commission must affirm the Board. As stated above, the Board's findings regarding medical records are to be affirmed even when there is a possibility of conflicting conclusions. The Commission affirms the Board's finding that D&D did not file the controversion in bad faith and no penalty is due.

c. The Board undervalued its order to Mr. Cavitt for entitlement to ongoing time loss benefits.

AS 23.30.145 provides direction for awards of attorney fees in worker's compensation claims. The statue states:

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. 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; the fees may be allowed only on the amount of compensation controverted and

⁶⁷ *Cavitt* at 4, Nos. 15 and 16.

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. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(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. The award is in addition to the compensation or medical and related benefits ordered.

The Board found it could award fees under either AS 23.30.145(a) or (b) and did not specify which section it was using to determine its award to Mr. Cavitt. Under AS 23.30.145(b), when a claim has been controverted and the employee retains counsel who successfully obtains benefits for the employee, "reasonable attorney fees" must be awarded.⁶⁸ Here, D&D controverted medical treatment and time loss contending there were alternative injuries not work related which accounted for his ongoing problems. As the Board correctly stated, without Mr. Cavitt's attorney's efforts, it is unlikely D&D would have obtained its EME as quickly as it did nor is it likely it would have rescinded its controversion so promptly after receiving its EME report. Yet the Board awarded less than fifty percent of the requested fees to Mr. Cavitt, relying on the fact that Mr. Cavitt did not prevail on either his requested compensation rate adjustment or his request for a finding of a frivolous controversion. Nonetheless, the intervention of Mr. Cavitt's counsel precipitated his receiving both TTD and medical treatment much more expeditiously than D&D might have done without Mr. Cavitt's retention of an attorney. These were substantial benefits to Mr. Cavitt and potentially of greater significance than either a compensation rate adjustment or a finding of a frivolous controversion.

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See, e.g., Bailey v. Litwin Corp., 713 P.2d 249, 258 (Alaska 1986).

Moreover, the Board undervalued another order. The Board reasoned it would severely limit its award of fees because the Board found that while Mr. Cavitt was entitled to an order for ongoing TTD, this order did not actually provide any new or additional benefit to Mr. Cavitt. However, an order of the Board, even one without providing any additional tangible benefits, has significant value which the Board ignored in its award of attorney fees to Mr. Cavitt.

The Board, in granting Mr. Cavitt an order "confirming his entitlement to TTD," denied any additional fees because "he did not receive any addition[al] benefits."⁶⁹ However, this misstates the effect and importance of such an order. In *Underwater Constr., Inc. v. Shirley*, the Court stated "an award was important to Shirley because it would have made it more difficult for [Employer] to change his status at a later time."⁷⁰ D&D was apparently aware of the importance of such an order as it vigorously opposed the Board granting the order. The Court, in *Shirley*, further stated that in addition to complying with the requirements in 8 AAC 45.136 for modifying or terminating benefits, once an order awarding certain benefits is made, "an employer seeking to modify or terminate payments made under a Board order must first seek the approval of the Board."⁷¹ The Court again endorsed this position in *Harris v. M-K Rivers*, noting "[w]e have held that 'the employer or insurer must petition the Board for rehearing or modification of its order on the basis of "a change of condition'" if payments are being made pursuant to a Board order."⁷²

Here, Mr. Cavitt prevailed on his request for an order granting him a finding of entitlement to ongoing TTD. This order has significant importance to Mr. Cavitt even if it did not result in an increase in benefits. This order is worth more than the \$500.00 estimated by the Board.

⁷¹ *Id.*

⁷² *Harris v. M-K Rivers*, 325 P.3d 510, 522 (Alaska 2014).

⁶⁹ *Cavitt* at 19.

⁷⁰ Underwater Constr., Inc. v. Shirley, 884 P.2d 150, 161 (Alaska 1994).

D&D strongly resisted the Board making this order, most likely because it realized once the Board ordered that Mr. Cavitt was entitled to ongoing TTD, even if limited in time to his becoming medically stable, D&D will have to petition the Board with objective evidence that Mr. Cavitt is medically stable prior to discontinuing benefits. Therefore, additional attorney fees are owed to Mr. Cavitt's counsel for prevailing on this significant issue. The Commission remands this matter to the Board for a determination of the time involved by Mr. Cavitt's counsel on this issue among other benefits obtained for Mr. Cavitt.

5. Conclusion.

The Board's finding that the compensation rate should not be adjusted is AFFIRMED as supported by substantial evidence in the record as a whole and by the plain language of AS 23.30.220(a). The Commission AFFIRMS the Board's finding that D&D did not file the controversion in bad faith and no penalty is due. The Commission REMANDS the attorney fee issue for a determination, among other things, of the time involved for Mr. Cavitt's request for an order granting him a finding of entitlement to ongoing TTD as Mr. Cavitt prevailed on this significant issue, and Mr. Cavitt's attorney provided significant assistance in obtaining benefits for him.

Date: <u>4 May 2018</u> ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed James N. Rhodes, Appeals Commissioner

Signed S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal 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 AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of Final Decision No. 248 issued in the matter of *Kiel L. Cavitt vs. D&D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company*, AWCAC Appeal No. 17-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 4, 2018.

Date: May 7, 2018



Signed K. Morrison, Appeals Commission Clerk