

Case: *Conam Construction Co. and ACE USA Insurance Co. vs. Oliver Bagula, Peak Oilfield Servs., Alaska Insurance Guaranty Ass'n, and Northern Adjusters, Alaska Workers' Comp. App. Comm'n Dec. No. 024 (January 9, 2007)*

Facts: Employee injured his right knee working for Peak Oilfield Services (Peak) in 1999 and had surgery to repair the knee; employee was advised he would probably need total knee replacement in the future. In 2003, Conam Construction Co. (Conam) assumed Peak's service contract and the employee worked for Conam for four months. Employee then sought compensation for a total knee replacement in August 2003. Board concluded Conam was liable under the last injurious exposure rule because his work there worsened his symptoms and accelerated his need for surgery. Conam appealed and sought a stay of a portion of the board's order out of a concern that it would not be able to seek reimbursement of the full sum from Peak if Conam prevailed on appeal.

Applicable law: The commission may grant a stay of 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[.]" AS 23.30.125(c) 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 more deliberate investigation." *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska 1992). (No ongoing compensation payments are at issue so higher standard for a stay did not apply.)

AS 23.30.155(d) provides in part:

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 attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

Issues: Should commission issue a stay of board's order requiring Conam to pay benefits and compensation for Bagula's knee replacement? Is AS 23.30.155(d) reimbursement capped at the amount an earlier employer would owe the injured employee, even though the wage rate, and thus temporary total disability benefits, would be higher under a later employer?

Holding/analysis: Commission did not discuss the appellants' serious questions making fair grounds for appeal of the board's decision, other than noting they had raised some. Instead, the commission concluded that the availability of reimbursement under AS 23.30.155(d) relieved the appellants from the possibility of irreparable damage and so the commission denied the stay. AS 23.30.155(d) reimbursement was not capped at the amount owed by an earlier employer to the injured employee

because statute reads "any reimbursement required" reflecting Legislature's intent to not cap reimbursement. In addition, Legislature understood that wage rates would vary as the state determines the average weekly wage on an annual basis and the workers' compensation system's calculation methods are designed to accommodate changes in workers' wages over the years, such that one employer may have to make payments based on a higher wage rate than another employer. Commission concluded that an earlier employer, who was the one seeking to shift responsibility to a later employer, bore the risk of overpayment due to a higher compensation rate and must reimburse the later employer that amount if the earlier employer is found liable. Commission viewed .155(d) as a benefit to the employee and noted that the efficiency of that benefit would be lost if last employer resisted payment on the grounds that it may not be able to get full reimbursement from an earlier employer. Lastly, commission also noted that *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222 (Alaska 1997), permitted recovery of a full award of attorney's fees at the board level, so it makes sense to infer that an employer may be fully reimbursed at the board level.

Note: The commission amended the regulation on stays, 8 AAC 57.100, effective March 24, 2012.