

Case: *Anchorage School District vs. Gerald H. Delkettie*, Alaska Workers' Comp. App. Comm'n Dec. No. 022 (October 19, 2006)

Facts: Anchorage School District (ASD) moved to stay the board's order, making arguments related to the employee's shoulder injury and the employee's mental illness claim. ASD also argued the board improperly shifted the burden of proof in concluding that the employee had not failed to cooperate with his reemployment plan and awarding a reemployment stipend.

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.)

Issues: Should any portion of the board's order concerning compensation and benefits for the shoulder injury and for the mental illness claim be stayed? Should the board's order concluding the employee did not fail to cooperate with his reemployment plan and granting a reemployment stipend be stayed?

Holding/analysis: On the board's order awarding compensation and benefits for Delkettie's shoulder injury, ASD argued that the board both misconstrued and rejected compelling testimony in support of its position that Delkettie's shoulder injury was not work related. But the commission concluded that although ASD argued its compelling evidence was rejected, this argument failed to address the sufficiency of the evidence in the record as a whole that the board relied on. The commission denied a stay.

The commission stayed the board's order granting future permanent partial impairment (PPI) for a mental injury but not the reimbursement to the employee for past medical treatment for a mental injury. The commission noted that the board appeared to have applied the wrong legal test and decided an issue not before it as Delkettie argued only that his shoulder injury aggravated a pre-existing mental condition, while the board decided he had a compensable mental illness based on workplace stress under AS 23.30.395(17). Commission also noted that board cited no evidence of other employees' experiences and how those were dissimilar or similar to support that Delkettie suffered stress "extraordinary and unusual in comparison to the pressures and tensions experienced by individuals in a comparable work environment" per .395(17). Balancing the hardships on the PPI, the commission concluded hardship to ASD was high because it probably could not later recover an erroneously paid PPI lump sum and hardship to employee was minimal because he did not even have a rating yet and he was not counting on the "unknown" sum for his livelihood. However, the balancing of the hardships on the out-of-pocket medical expenses owed to the employee resulted in the commission not issuing a stay. (The commission did stay the reimbursement of medical expenses owed to the employee's private insurer.)

The commission did not stay the board's order granting a reemployment stipend. ASD failed to present serious and substantial questions going to the merits because Delkettie testified that he did not attend a class in his plan because his counselor had advised him it was not available and the board found him credible and concluded his failure to attend a class was not "noncooperation." The commission concluded that "ASD did not produce evidence that the board erred in its determination of credibility and findings of fact or argument that the failure to attend was unreasonable as a matter of law." Dec. No. 022 at 10. Commission also noted the issue would be moot if the PPI was paid because the employee could not receive PPI and the stipend at the same time and the plan was now complete.

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