

Case: *State of Alaska, Department of Transportation vs. Nicholas T. Stowell*, Alaska Workers' Comp. App. Comm'n Dec. No. 124 (October 15, 2009)

Facts: The State of Alaska, Department of Transportation (the State) sought a stay so that it would not have to pay an attorney fee award. The State was appealing the award because the board doubled the attorney's requested fee. The board had concluded that Nicholas Stowell (Stowell) prevailed in his claim for a finding of frivolous and unfair controversion. The board found that Stowell's attorney provided 13.6 hours of valuable services at an hourly rate of \$300 to \$325, which the board found was reasonable. It concluded that the attorney "worked to secure the employee's fundamental entitlement to medical benefits" and doubled the attorney fee award "to insure continuing motivation to represent the injured." *Nicholas T. Stowell v. State of Alaska, D.O.T.*, Alaska Workers' Comp. Bd. Dec. No. 09-0137 at 12. The commission asked the parties to present supplemental authorities on the issue of whether the commission could require a supersedeas bond from the State.

Applicable law: AS 23.30.125(c) allows the commission to 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" and, under *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 176 (Alaska 1992), the appeal raises "questions going to the merits [of the board decision] so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

The harm to the appellant is considered irreparable as a matter of law in workers' compensation appeals when there is no prospect that the sum paid by the appellant pursuant to board order may be recovered from future compensation paid to the employee. *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066-67 (Alaska 1991).

AS 23.30.128(c) permits the commission to take evidence and make findings of fact on motions for stay.

AS 09.68.040 bars any court in the State of Alaska from requiring the State to post a supersedeas bond in a civil action.

Issues: Should the commission grant the stay? Can the commission require a supersedeas bond from the State?

Holding/analysis: The commission concluded the balance of hardships tipped in favor of the State and that the State would suffer irreparable harm. First, the commission decided that there was no undisputed liability for future compensation benefits from which the State may recover the attorney fee award if it was reversed on appeal. The commission also considered that the employee would suffer harm if forced to pay back part of an award that was "the cost of motivating attorneys to be available to represent the injured generally," rather than solely his own attorney's fees. Dec. No. 124 at 8. Thus, the employee would potentially suffer greater hardship if the commission did not grant a stay. Moreover, the accumulation of interest would

compensate any hardship to Stowell's attorney as a result of a delay in payment occasioned by a stay.

Second the board's doubling of the fee award raised "serious and substantial questions." The board concluded that "an award of a fee of \$4,217.50 and costs of \$150 was sufficient to compensate the employee's counsel for successfully prosecuting a claim for no compensation or specific medical treatment, but a brief period of intangible right." *Id.* at 8. But the board doubled the award solely to motivate attorneys to represent injured workers in medical benefits cases. The first "serious and substantial question" was the State's argument that there was no claim for medical benefits, but only a claim for unfair controversion based on a possible need for medical treatment. Another serious question was whether the board could award a multiplier based on a "private attorney general" theory, rather than a concern for vindication of Stowell's rights. The third serious question was whether the board properly established the fact that medical-benefits-only cases were not lucrative.

However, the commission concluded that the State did not raise "serious and substantial" questions concerning the reasonableness of the base fee award. Thus, the commission stayed half of the attorney fee award.

Finally, the commission concluded that it lacked the power to require the State to post a supersedeas bond because courts could not require a bond and the authority of the commission, as a quasi-judicial agency, was more restricted than that of a court.