

Case: *Judith Lewis-Walunga and William J. Soule vs. Municipality of Anchorage*, Alaska Workers' Comp. App. Comm'n Dec. No. 123 (December 28, 2009)

Facts: William Soule (Soule) sought a fee award from the board for his work on Judith Lewis-Walunga's (Lewis-Walunga) claim from December 14, 2006, through the board's decision on the claim on June 30, 2008.

Lewis-Walunga was injured in a fall in 2004. She never returned to work and retired a year later. The parties resolved some disputes and Soule was paid fees up to December 13, 2006. After that time, "a number of subsidiary disputes were resolved, or claims and controversions withdrawn, as the parties proceeded to hearing, including Lewis-Walunga's objection to attending a neuropsychological examination, her request for a neurological second independent medical examination (SIME), TTD for certain periods, certain medical benefits, and her claim for cognitive deficits related to a brain injury. By the hearing on April 1, 2008, the only claims Lewis-Walunga asserted were for 5 weeks of TTD, additional PPI up to 33 percent, medical benefits, penalties on PPI previously paid, interest, and attorney fees and costs. Her chiropractor . . . also filed a claim for payment of services. . . . The board heard the case and decided Lewis-Walunga was entitled to 21 percent PPI, 5 weeks of TTD, interest, and some medical benefits. It denied [the chiropractor's] claim and Lewis-Walunga's claim for penalties." Dec. No. 123 at 3-4.

On the claim for attorney fees, the board ultimately awarded fees under .145(b), concluding that the payment of benefits was resisted by the employer, without further explanation. However, because the "total attorney fee award requested is substantially more than the compensation benefit amount awarded to the employee in the Board's June 30, 2008 D&O, and we do not wish to speculate as to the value of any future benefits to the employee, we will reduce the attorney fee award from the total figures requested. Specifically, given the value of the benefits awarded the employee was approximately \$20,000, we direct the employer to pay 30% less than the full employee's attorney fee award requested[.]" *Judith Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 08-0122 at 20. Lewis-Walunga appeals.

Applicable law: AS 23.30.145 on attorney fee awards.

The board has authority to award fees under AS 23.30.145(a) when an employer controverts a claim. "In contrast," the Alaska Supreme Court has said, "subsection (b) requires an employer to pay reasonable attorney fees when the employer delays or 'otherwise resists' payment of compensation and the employee's attorney successfully prosecutes the claim." *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 151 (Alaska 2007).

AS 23.30.145(a) establishes a minimum fee, but not a maximum fee. The board must consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries."

AS 23.30.120(a), presumption of compensability.

Issues: Did the board adequately explain its rationale for awarding fees under AS 23.30.145(b)? Were the board's findings of fact sufficient to permit appellate review? Does the presumption of compensability (i.e. a presumption that requested fees are reasonable) apply to fee award requests?

Holding/analysis: First, the commission concluded that it was plain error to award a fee under .145(b) without explanation. The Municipality of Anchorage had filed formal controversions and answered Lewis-Walunga's claims, but the board failed to explain why it awarded fees as though no timely controversion had been filed or no controversion in fact made.

Second, the board's findings were insufficient. The board stated the case was "complex" but did not explain "the relative complexity of the legal services, or which services were more or less than usually complex. . . . The fact that depositions were taken, standing alone, does not make a litigated case *unusually* complex." Dec. No. 123 at 11. In addition, the board failed to determine if the services performed resulted in the benefit awarded. The board should not have considered the services provided in contesting the SIME since the employee ultimately withdrew her objection to the SIME and, thus, those services did not result in the benefits obtained. However, the commission did "not disapprove the comparison of values of benefits awarded to benefits sought as a means of establishing a percentage basis for calculating a fee[.]" *Id.* at 11. Because the board was charged with fact-finding, the commission remanded to the board to explain the basis for the fee award calculation.

Finally, "there is no presumption that an hourly rate or number of hours devoted to a service is reasonable." *Id.* at 12. The claimant must produce evidence and persuade the board that the requested fee is reasonable. The commission summarized the purpose of the attorney fee statute, concluding, "The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other." *Id.* at 15.

Note: On a separate motion, the commission refused to award attorney fees for the work on appeal before the commission, concluding that Lewis-Walunga was not the prevailing party. The Alaska Supreme Court reversed this decision, 249 P.3d 1063 (Alaska 2011).