

Case: *Akeem J. Humphrey vs. Lowe's HIW, Inc. and New Hampshire Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 179 (March 28, 2013)

Facts: Akeem J. Humphrey (Humphrey) was injured on November 30, 2009, while working for Lowe's HIW, Inc. (Lowe's), when a metal cantilever beam fell and struck his back and left shoulder. Humphrey did not work from December 19, 2009, to January 3, 2010, during which time Lowe's paid temporary total disability (TTD) benefits to him. He then returned to work with restrictions. He received a positive employee evaluation in early February. On February 16, 2010, Humphrey submitted a note to Lowe's, giving two weeks' notice "due to personal reasons. (no transportation no house)."

Humphrey admitted giving notice due to transportation issues but stated that he withdrew that notice. He testified that he believed he was fired on February 22, 2010. On that date, he testified that he was paged to manager Brandon Montgomery's (Montgomery) office. Montgomery said, "[i]t's not my decision; it's over me. They want - - they stated they want you to go ahead and go through with your two weeks' notice." Humphrey testified that Montgomery stated "that I can resign and have an opportunity to come back whenever I'm - - whenever my whole back and everything is done, or I could be terminated." Humphrey was paid through March 1, 2010.

On May 24, 2010, Humphrey filed a workers' compensation claim. He sought TTD benefits from the date of injury, permanent partial impairment (PPI) benefits, medical costs, penalty, interest, and attorney's fees and costs. On seeing Humphrey on May 25, 2010, Dr. Witham stated his opinion that Humphrey was not medically stable.

Montgomery testified that in February 2010, Humphrey submitted notice because of personal reasons, telling Montgomery he was relocating to Nevada. He denied paging Humphrey to his office as Humphrey had testified, and stated that as a store manager, he does not have sole authority to fire employees.

Kimberly Cook (Cook) testified that she was operations manager for Lowe's in Fairbanks while Humphrey worked there and was his supervisor. Cook described Humphrey as a great employee and she wanted to keep him. Cook testified that Humphrey put in his notice and then withdrew it, and then resubmitted it and withdrew it again. Eventually, Humphrey told her he was quitting due to personal issues. She never discussed firing him. Had there been a meeting giving Humphrey the option to resign or be terminated, she would have been present, along with Montgomery, and the Human Resources Manager. There would have been written documentation of such a meeting in Humphrey's personnel file.

Lowe's controverted TTD benefits after February 16, 2010, because Humphrey had voluntarily left his employment. The board found Montgomery and Cook credible and Humphrey not credible. The board concluded that Humphrey was not entitled to TTD after February 16, 2010, because he voluntarily left his job and did not seek alternative employment. The board awarded attorney fees. Humphrey appeals.

Applicable law: Under AS 23.30.185, a claimant is entitled to TTD benefits while he or she is disabled, until medical stability is reached. "Disability" as defined for workers'

compensation purposes is “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]” AS 23.30.395(16). The Alaska Supreme Court has held that “[i]f a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability.” *Vetter v. Alaska Workmen’s Compensation Bd.*, 524 P.2d 264, 266 (Alaska 1974).

“The board’s findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record.” Credibility findings are binding on the commission. AS 23.30.128(b).

AS 23.30.122 provides that “The findings of the board are subject to the same standard of review as a jury’s finding in a civil action.” A jury’s finding in a civil action can be overturned only if “the evidence, when viewed in the light most favorable to the non-moving party [on a motion for judgment notwithstanding the verdict], is such that reasonable men could not differ in their judgment.” *Alaska Children’s Services, Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984).

AS 23.30.145(a) provides, in relevant part, that when a claim is controverted, the board can direct the employer to pay the claimant’s attorney’s fees, in addition to the compensation awarded, but only on the amount of compensation controverted and awarded. In making an award under subsection .145(a), the board is to take into consideration the nature, length, and complexity of the services performed and the benefits resulting from the services. In contrast, AS 23.30.145(b) states that if an employer otherwise resists the payment of compensation or medical and related benefits, and the claimant has employed an attorney in the successful pursuit of the claim, the board is to make an award of reasonable attorney fees. Under subsection .145(b), the fee award should bear a relationship to the issues on which the claimant prevailed. *Bouse v. Fireman’s Fund Ins. Co.*, 932 P.2d 222, 241 (Alaska 1997).

Issues: Does substantial evidence support the board’s finding that Humphrey quit his job? Viewing the evidence in the light most favorable to Lowe’s, was it reasonable for the board to find that Humphrey quit his job? Did the board make adequate findings in awarding fees under AS 23.30.145(b)?

Holding/analysis: The commission concluded that substantial evidence supported the board’s finding that Humphrey quit his job.

Circumstantial evidence, that Humphrey received a positive evaluation from Lowe’s, that he gave notice, and that he announced his intention to relocate to Nevada, also supports the board’s finding. Ultimately, the documentary evidence surrounding Humphrey’s termination is not necessarily indicative of his being fired; it shows that he was deemed suitable for rehire. The commission concludes that the foregoing is substantial evidence supporting the board’s finding that Humphrey quit his job at Lowe’s in February 2010. Dec. No. 179 at 17.

The commission also reviewed the board's finding under the same standard as a jury's finding in a civil action. The commission viewed the evidence in the light most favorable to Lowe's and considered whether the finding was reasonable. The commission concluded that it was. Thus Humphrey was not entitled to TTD benefits between late February 2010 and May 2011.

The commission observed that the criteria for awarding fees under .145(a) (Lowe's controverted TTD, PPI, and medical costs), and under .145(b) were met. The board awarded fees under .145(b), reducing the fees that Humphrey requested by 30 percent because he did not prevail on the bulk of his TTD claim. The commission vacated and remanded this award for two reasons:

First, the lack of any explanation by the board for not awarding attorney fees under subsection .145(a) is troubling to the commission. Second, the board's relatively terse explanation for reducing the award prevents meaningful review by the commission of its award under subsection .145(b). *Id.* at 21.

Note: This case is on appeal to the Alaska Supreme Court.