

Case: *Municipality of Anchorage and NovaPro Risk Solutions vs. Robert Rehbock and Herb McKinney*, Alaska Workers' Comp. App. Comm'n Dec. No. 058 (October 1, 2007)

Facts: The employee strained his back at work in November 2003, and the employer paid benefits. In January 2004, the employee again strained his back, this time while working on his personal computer at home. The employer paid workers' compensation benefits (an apparent mistake) after his union health trust refused to pay because it asserted that it was a workers' compensation injury. The employer paid about \$9,000 in compensation and benefits until it controverted in October 2004 based on two doctors' reports. The employee retained attorney Robert Rehbock who filed a claim in November 2004 on behalf of the employee seeking permanent partial disability compensation and medical benefits. At a prehearing conference, the employee acknowledged the injury occurred while working on his home computer but claimed this injury was connected to the earlier work-related November 2003 injury. But the employee's and employer's doctors agreed that the January 2004 injury was not work-related and so the health trust began paying for medical coverage. The parties then negotiated a settlement that provided the employer waived reimbursement of the asserted overpayment from the employee or the health trust, the employee waived future benefits for the November 2003 injury, and Rehbock would receive an attorney fee of \$4,000. The employee refused to sign the agreement.

Rehbock asked the board to award him attorney fees against the employee. The board's decision stated:

We find that the employer controverted and otherwise resisted paying the employee medical and timeloss benefits associated with his back condition. We also find that, even though the employee's claim was ultimately shown to not be a workers' compensation injury, the employee enjoyed the benefit of approximately \$9,000.00 that he would not have otherwise timely received. We find Mr. Rehbock provided valuable services on behalf of the employee which ultimately resulted in a benefit to the employee, to wit, a drafted C&R. We recognize the employee has refused to sign the C&R and it remains to be executed, and the employer is deprived of full "closure" to the employee's November 2003 back strain, but we still find and conclude that Mr. Rehbock's representation has resulted in benefits to the employee. Accordingly, we find we can award a fee under AS 23.30.145. Dec. No. 058 at 6.

The board awarded a fee of \$2,000 to be paid by the employer, since the employer did not receive the "closure" of the settlement but was benefited "to a certain degree" by Rehbock's representation of the employee. The employer appealed.

Applicable law: AS 23.30.145 provides in relevant part:

(a) . . . When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted

and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. . . .

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

Issues: Can the board award an attorney fee against the employer based on work performed by the employee's attorney that resulted in negotiation of a settlement that the employee refused to sign? Can the board award fees against the employee in such circumstances?

Holding / analysis: The commission reversed the board's decision. The commission stated that the employer's liability for attorney fees is based upon the employer's liability for workers' compensation to the employee. ". . . AS 23.30.145 is not designed to require employers to pay employee attorneys who do not obtain an award of compensation, or whose services are provided in an unsuccessful claim." Dec. No. 058 at 9.

The board could not award fees under .145(a) because the board awarded no compensation to the employee since his claim was not work-related. Moreover, none of limited circumstances provided in .145(a) for ordering payment by a person other than an employer were met.

This provision may be used to award fees, for example: to establish a conservatorship to receive uncontroverted permanent total disability compensation for a worker who is no longer competent to receive compensation payments, AS 23.30.140, or for services to a dependent married child beneficiary whose death benefits are not controverted or resisted by the employer, but are unsuccessfully contested by the deceased workers' spouse at the time of injury. Dec. No. 058 at 10 n.44.

The commission concluded that the board could not award fees under .145(b) because such awards "must be based on the successful prosecution of the claim and reflect the degree of the employee's success." *Id.* at 11. The worker's claim was not successful because it was found to not be a workers' compensation injury. In addition, the \$9,000 that the employee was overpaid was not received as a result of his attorney's efforts but was the adjuster's mistake. "An employee's ability to retain money mistakenly paid by the employer in the absence of liability is the result of operation of law, AS 23.30.155(j), not the attorney's successful prosecution of the employee's claim." *Id.* at 11 n.46. Lastly, the settlement was void because the employee unconditionally

rejected it; there were no ongoing negotiations. “The board’s characterization of an unexecuted, rejected agreement as a ‘benefit’ obtained through successful prosecution of a claim is contrary to AS 23.30.012(a), which provides that an agreement not in a form prescribed by the director and filed in the division is ‘void for any purpose.’” *Id.* at 12. The commission concluded that “[i]f an agreement is ‘void for any purpose,’ it cannot serve as the basis for a board award of attorney fees against an employer, because it cannot establish any right or benefit for the employee. Moreover, it cannot be enforced, even in part, as it appears the board may have been attempting to do by awarding only half the amount agreed on in the rejected settlement.” *Id.* at 13. Finally, the only benefit the employer received from the employee’s attorney’s efforts was perhaps a more orderly discovery process and that is not a “benefit” justifying an award of fees against the employer because it would mean employee’s attorneys are always paid, contrary to the statutory contingency fee scheme.

Lastly, the commission concluded that the board had no authority to order payment of fees for services collateral to a workers’ compensation claim as AS 23.30.145 provided the “*only* mechanism for a board award of attorney fees[.]” Dec. No. 058 at 14. Rehbock wanted the board to order the employee to pay him fees because he resolved the employee’s health insurance coverage dispute with the union health trust. The commission concluded that

The board’s authority is limited to approval or awards of a fee, not to enforcement of the attorney services contract. The board has no authority, except as provided in AS 23.30.145(a), to *order* an employee to pay an attorney fee for advice. It is for the courts, not the board, to decide whether an attorney may bring a collection action for attorney services parallel or collateral to a workers’ compensation claim, or, once the attorney obtains board approval of the fee, with respect to a claim that is not controverted, delayed or resisted. *Id.* at 15-16 (footnote omitted).