Alaska Workers' Compensation Appeals Commission

Anchorage School District,
Appellant,

vs.

Gerald H. Delkettie,
Appellee.

Memorandum Decision and Order
on Motion for Stay Pending Appeal
Decision No. 022 October 19, 2006

AWCAC Appeal No. 06-028
AWCB Decision No. 06-0256
AWCB Case No. 200308431

Memorandum Decision and Order on Motion for Stay Pending Appeal from Alaska Workers' Compensation Board Decision No. 06-0256, issued September 20, 2006, by the Southcentral Panel at Anchorage, Rosemary Foster, Chair; Robert S. Morigeau, Member for Labor; H. Bardie Scarbrough, Member for Management.

Appearances: Deirdre D. Ford and Tregarrick R. Taylor, DeLisio, Moran, Geraghty & Zobel, for appellant Anchorage School District; Robert A. Rehbock, Rehbock & Rehbock, for appellee Gerald H. Delkettie.

Commissioners: Marc Stemp, Jim Robison, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

This motion for stay of enforcement of the board's September 20, 2006 decision[1] awarding certain benefits to Gerald Delkettie, a former employee of the Anchorage School Board, was heard by the commission on October 11, 2006, upon notice provided in accordance with AS 23.30.128(c). The commission gave the parties until 5:00 p.m. to submit up to 20 pages of documentary evidence in support of their positions. The appellant submitted a copy of a compensation report dated August 8, 2006, and portions of the reports of Dr. Lipscomb, Dr. Brooks, and Dr. Lipon, discussed in the

[1] *Gerald Delkettie v. Anchorage School District,* AWCB Decision No. 06-0256 (September 20, 2006).

appellant's motion for stay. The appellee submitted copies of notices describing bills and a copy of a statement by a medical provider. No testimony was presented.

Anchorage School District (ASD) argued that it would suffer irreparable harm if the board's award was paid and ASD could not recover the compensation paid in the event of reversal of the board. ASD conceded that much of the board's award had already been paid, and Delkettie agreed that a large portion of the award had been paid. Delkettie also agreed that the reemployment plan was complete.

ASD's arguments may be divided into three parts: those concerning the shoulder injury; those concerning the mental illness claim; and, the argument regarding the brief period of reemployment benefits. 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. ASD argued the board did not put ASD's evidence on the scale to be weighed, but rejected it without weighing it. Therefore, ASD argues, the board's decision awarding additional permanent partial impairment compensation and medical benefits for the shoulder injury is fatally flawed and there is a probability of success on the merits. ASD argues that there is insufficient evidence to support either a claim of a mental stress injury or a claim of aggravation of a pre-existing mental illness by a physical injury. In particular, ASD argues that the board's finding of extraordinary and unusual pressures and tensions in Delkettie's employment in comparison to other workers similarly situated is not supported by any evidence because the only evidence of other workers' experience was that it was similar. ASD also argues that the board's reliance on Dr. Early's report to find that the shoulder injury worsened a pre-existing condition did not complete the circle because Dr. Early deferred to the opinion of Dr. Lipon as to whether the shoulder injury was work-related. ASD argued that because Dr. Lipon's opinion was that the shoulder injury was not work-related, the board could not rely on Dr. Early's report as the basis for its finding of work-relationship of a mental illness. ASD argued that the board's determination that Delkettie is entitled to future permanent partial impairment compensation for a mental illness was made in the absence of any evidence of permanent impairment. Finally, ASD argued the board erred as a matter of law in awarding reemployment benefits to the employee when he

failed to attend a planned class because the board improperly shifted the "burden of error" to the employer.

Delkettie argues that the board did weigh the evidence and that ASD's argument is an attempt to reweigh the evidence. ASD has the burden of showing that there are serious and substantial questions whether the board made an error of law, or that it had substantial evidence to support its decision to award permanent impairment compensation for the shoulder injury. ASD has not shown that the board's reasoning was flawed or that the evidence relied on by the board is insufficient. Delkettie concedes for purposes of the stay that he did not claim a mental illness caused by mental stress in the employment and that the board went beyond the claim in finding his mental illness was predominantly caused by the stress of his employment; however, this is not a fatal flaw in the board's decision because the award of medical benefits is supported by its finding that the shoulder injury aggravated the pre-existing mental illness. The award of future compensation does not result in harm to the employer as there has been no rating of permanent impairment due to mental illness. Finally, Delkettie argues ASD again failed to demonstrate that the board lacked substantial evidence to make an award of reemployment benefits.

The standards for a commission stay of a board order.

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"[2] 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."[3] Continuing future periodic compensation payments may not be stayed unless the appellant can show both irreparable damage *and* "the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation

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[2] AS 23.30.125(c).

[3] *Olsen Logging Co. v. Lawson*, 832 P.2d 174, 175-176 (Alaska 1992).

payments."[4] At oral argument, the parties agreed that no on-going period payments of compensation are presently owed under the board's order.[5] Therefore, ASD, as the party seeking the stay, must show that there are "serious and substantial questions going to the merits of the case" and that the injury that would result from the stay can be indemnified by a bond or is relatively slight in comparison to the injury that the party seeking the stay will suffer if it is not granted. This is the "balance of the hardship approach" the Supreme Court described in *Olsen Logging Co. v. Lawson*,[6] and it is the test we apply here.

> *ASD failed to demonstrate such serious and substantial questions going to the merits as to require a stay of the board's order awarding compensation and benefits for Delkettie's shoulder injury.*

ASD's argument is that the board rejected evidence from Dr. Lipon and Dr. Brooks and that the reasons given for the rejection of the evidence is not compatible with the evidence – that is, that no reasonable board member, reviewing the evidence, could have reached the conclusion the board drew from the evidence. We agree that ASD has raised a serious question regarding the board's articulation of its reasons for giving less weight to Dr. Lipon's and Dr. Brook's evidence. However, ASD's argument is one step short of reaching the merits of the board's order.

The commission is required to uphold the board's order unless the board's decision is not supported by substantial evidence in light of the whole record.[7] Unless the evidence the board relied to reach its decision is insufficient, the board's alleged

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[4] AS 23.30.125(c).

[5] Delkettie's counsel conceded that the only future payments that may be owed are of medical benefits to which Delkettie may be entitled more than two years after his injury for treatment of the mental illness. No rating of permanent impairment has been made by Delkettie's physician for mental illness. There is no claim that the mental illness prevents Delkettie from working.

[6] 832 P.2d at 176.

[7] AS 23.30.128(b).

errors regarding ASD's rejected evidence are not necessarily errors that would result in a reversal of the board's decision.[8]

ASD's arguments essentially amount to claims that the board's decision on the shoulder injury was against the weight of the evidence. The commission may not reweigh the evidence, therefore an argument for stay must address the sufficiency of the evidence[9] the board cited in support of its conclusions, or its application or understanding of the law, to go to the merits of the board's decision. [10] ASD presented no evidence or argument that the board lacked evidence to support one of the conclusions it drew or that the board made an error of law tainting its conclusions

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[8] Even if the board misconstrued the evidence offered by ASD, it does not follow that the board must have misconstrued the evidence it relied on.

[9] The commission will not disturb the board's findings of fact unless they are not supported by substantial evidence in light of the whole record. AS 23.30.128(b). If there is such evidence to support the board's findings, we will not disturb the board's findings unless, considered in the light most favorable to the board, the evidence is so clearly to the contrary that reasonable persons could not differ in their judgment. *Marine Solution Services, Inc., v. Horton,* 70 P.3d 393, 413 (Alaska 2003); *Alaska Democratic Party v. Rice,* 934 P.2d 1313, 1320 n. 10 (Alaska 1997); *Diamond v. Wagstaff,* 873 P.2d 1286, 1290 (Alaska 1994); AS 23.30.122. These two formulas come to much the same thing, for substantial evidence is such evidence as a reasonable mind could rely on to reach a conclusion. If reasonable minds could rely upon the evidence that the board chose to rely on, despite the existence of contrary evidence, it must follow that there is room for a diversity of opinion among reasonable persons and the board's findings must stand.

[10] The following analogy explains why the commission sees ASD's argument as falling short of the merits. A man must build a table, needing a surface and at least three equal legs. He has a choice of what wood he uses to build the table. Woodlot Q supplies a surface and legs of oak; woodlot A supplies a surface and legs of alder. The man chooses alder. Q may argue that oak is heavier and stronger, but that argument does not go to whether the man selected sufficient wood to build a table. To go to the merits, Q must point to a structural flaw in the table built (for example, that one of the legs is missing) or the alder used (for example, that the alder is too wormy to support the surface), or a constitutional flaw in the method of choosing among wood suppliers (for example, rejecting the oak solely because it is imported from Tennessee). Showing the man misunderstood oak's value is one step to showing a flawed building process; the next step is to show that although oak was available, the man built his table of wormy alder with only two legs.

regarding the shoulder injury. ASD's argument failed to address the sufficiency of the evidence supporting the board's decision. Because ASD failed to demonstrate serious and substantial questions going to the merits of the board's decision, we may not stay the board's order.

> *ASD demonstrated serious and substantial questions going to the merits of the board's finding of a mental injury due to stress in the employment.*

Although Delkettie presented a claim based on mental illness (depression) worsened by a physical injury, the board exclusively analyzed the employee's claim for a compensable mental illness as one based on mental stress in the employment under AS 23.30.395(17).[11] We note that AS 23.30.395(17) requires that an employee demonstrate that the work stress is "extraordinary and unusual in comparison to the pressures and tensions experienced by individuals in a comparable work environment." Although the board concluded that Delkettie had experienced extraordinary and unusual stress, it did not cite the evidence establishing the comparison to other individuals. The standard is based on actual events, not an ideal work environment. Delkettie is competent to testify to his own experience, and the board describes actual events that are the basis of his claim of stress. However, the board cites no evidence of other employees' experience and how it is dissimilar or similar. We agree that the board's reasoning, and the lack of evidence cited in the board's decision, raise serious and substantial evidence going to the merits of the board's decision.

We also find the absence of a claim by Delkettie that his mental illness was brought about by stress raises a serious and substantial question going to the merits of the board's decision. The board's decision to ignore the claim raised by Delkettie suggests that the board did not decide the disputed issue placed before it: whether the employee's physical injury aggravated a pre-existing mental condition. AS 23.30.395(17) applies only to mental injury or illness that is claimed to be the result of mental stress in the employment; it does not apply to every mental illness claim. A

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[11] *Gerald Delkettie,* AWCB Decision No. 06-0256 at 20-23.

claim of aggravation of a pre-existing mental illness due to compensable physical injury is a claim for compensation as a "direct consequence" of a compensable injury; that is, as a secondary injury that is compensable as the direct and natural result of a primary compensable physical injury. A direct consequence injury claim shares in the presumption of compensability applied to the primary injury claim. Delkettie's decision regarding the type of mental illness claim he made has serious impacts on how he proves his claim and the benefits to which he may be entitled. The board's unexplained disregard of Delkettie's claim raises serious questions.

We agree that the employer has presented serious and substantial questions going to the merits of the board's decision to award Delkettie benefits for mental illness, including a permanent partial impairment rating (and apparently compensation) "when deemed appropriate by his treating physician."[12] Based on the compensation report presented, and the statements of counsel at oral argument, we find that payment of compensation for the shoulder injury, including medical benefits, has already largely occurred, and that, because Delkettie completed his reemployment plan, any remaining permanent partial impairment compensation for the shoulder injury is payable in a lump sum.[13] We find in the event of payment of a lump sum of permanent partial impairment compensation for mental injury, there is not a likelihood that there will be continuing future payments sufficient to serve as a source of recovery.[14] We

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[12] *Gerald Delkettie,* AWCB Decision No. 06-0256 at 27.

[13] AS 23.30.041(k).

[14] In *Croft v. Pan Alaska Trucking, Inc.,* 820 P.2d 1064, 1066 (Alaska 1991), the Alaska Supreme Court held AS 23.30.155(j) is the exclusive remedy available to an employer to recover a previously paid award following a successful appeal. If an employer is forced to make a lump sum payment (such as a future award of permanent partial impairment compensation after completion of a reemployment plan) and will not, if successful on appeal, have an obligation to make continuing payments of compensation, the employer is without a remedy to recover the lump sum payment. "In this situation, the employer's harm is not only irreparable but an appeal becomes a meaningless exercise since, win or lose, the money once paid can never be recovered." *Olsen Logging,* 832 P.2d at 171.

conclude that ASD has shown that irreparable damage will result to the appellant if a stay of compensation for mental illness is not granted. On the other hand, Delkettie has not yet actually been given a rating for permanent partial impairment due to mental injury and he is not dependent on this unknown sum for his livelihood. We find the balance of the hardships tips in favor of the appellant. We therefore grant a stay of that portion of the board's order regarding permanent partial impairment rating or compensation.

The balance of the hardships favors payment of medical benefits for mental illness.

The board described in its decision the opinions of psychological experts supporting the claim of mental injury:

> Two of the employee's treating physicians indicated the employee suffered a mental injury. The reports of Dr. Aarons and Dr. Nassar reflect treatment for the employee's depressive condition, which became more severe after his shoulder surgeries and required psychiatric intervention and medications through the Langdon Clinic and, on occasion, through Dr. Aarons. Dr. Early conceded that the employee may have suffered depression and anxiety as a prior condition, which would have predisposed him to be more vulnerable to the onset of a mental condition such as aggravated depression and anxiety. Dr. Early did report that following the worsening of the employee's bilateral shoulder pain in around June 2003, the employee experienced a significant exacerbation of depression resulting in impairment which required medication.[15]

The board described the relationship between the increase in mental symptoms and the physical injury as the increase in mental symptoms "after" or "following" the shoulder surgeries.[16] Assuming the board intended to describe a causal relationship, there may have been evidence to support a "direct consequences" claim for aggravation of a

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[15] *Gerald Delkettie,* AWCB Decision No. 06-0256 at 21.

[16] The Alaska Supreme Court has noted that *post hoc ergo propter hoc* reasoning is a logical fallacy: just because the mental illness symptoms increase came *after* the physical injury does not mean that the physical injury *caused* the mental illness. *See, e.g., Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948 (Alaska 2005); *Alaska Pulp Corp. v. Trading Union, Inc.*, 896 P.2d 235 (Alaska 1995).

mental illness by a physical injury. While the employer has presented serious and substantial questions going to the merits of the board's decision to award Delkettie benefits for mental illness due to stress in the employment, the evidence *may* support a finding that Delkettie's claim for mental illness treatment is compensable on a "direct consequences" claim. ASD produced no evidence that suggests the board's reading of the evidence it cited in support of a causal link between the shoulder surgery and the mental illness symptom increase was not correct. The costs associated with treatment of the mental illness were not shown to be substantial, and Delkettie's counsel described the benefits as occasional visits and some medication. This description was not challenged by ASD. The board noted in its order that the employee had a personal insurer who paid at least a portion of the costs.

If medical costs are paid as part of the "direct consequences" of a compensable injury that is later held not covered, the board may offset the overpayment to the employee's provider against other future payments to the employee on the primary compensable injury. Neither party stated reimbursement could be made by Delkettie's personal carrier if the board's order directing payment to the carrier is later reversed. We find that the balance of the hardships tips in favor of the appellee as to payment of his out of pocket costs for mental health treatment. But, without any showing of availability of reimbursement from the carrier,[17] we find the balance does not tip in favor of the appellee's personal insurer. We deny a stay of the board's order directing it to reimburse Delkettie his past "out of pocket" medical treatment costs for mental illness, but for the reasons set out in the previous section (in particular, the unavailability of reimbursement), we grant a stay of that portion of the order directing reimbursement to the employee's personal insurer pending this appeal.

[17] It is not clear to us that the board has jurisdiction over the employee's personal insurer, which is not a party to the underlying case, to direct repayment of an overpayment.

ASD failed to demonstrate such serious and substantial questions going to the merits as to require a stay of the board's order awarding stipend under AS 23.30.041(k).

ASD argued that the board improperly shifted the "burden of error" to the employer by finding Delkettie's failure to attend a class in his plan was not "non-cooperation" resulting in suspension of his stipend benefits.[18] The only issue the board had before it was whether the mistake by Delkettie led to "reasonable" failure to attend designated programs instead of the "unreasonable failure" that the statute includes in its definition of non-cooperation.[19] In making its decision, the board made an explicit finding that Delkettie's testimony that he believed the class was unavailable as a result of a representation by his counselor was credible.[20] Findings of credibility of a witness who appears before the board are binding upon the commission.[21] 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. We find ASD failed to produce serious and substantial arguments going to the merits of the board's decision.

We also find this issue may be moot. Reviewing the compensation report submitted by ASD, we see that the employer paid 50 weeks of permanent partial impairment compensation ($25,206.30) before converting the employee to stipend benefits, which it paid for almost 22 weeks. If, as the board found, the employee was entitled to a larger award of permanent partial impairment compensation ($44,250), the period stipend was paid to Delkettie would be a period he was owed weekly permanent partial impairment compensation under AS 23.30.041(k). The difference in the amount of permanent partial impairment compensation paid and the amount owed under the

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18 *Gerald Delkettie*, AWCB Decision No. 06-0256 at 20.

19 AS 23.30.041(n)(1).

20 *Id.*

21 AS 23.30.128(b).

board's order is more than 35 weeks, from July 24, 2005, through the period of suspension and continuing past January 28, 2006, when the plan was complete. Since the employee cannot receive stipend for a period when permanent partial impairment compensation is paid, the issue is moot if the employee is paid the permanent partial impairment compensation awarded by the board.

Order of stay.

The appellant's motion for stay pending appeal under AS 23.30.125(c) is DENIED as to compensation and medical benefits awarded by the board for the shoulder injury and reemployment benefits stipend. The appellant's motion for stay is GRANTED as the board award of a future permanent partial impairment rating or compensation for the mental illness claim. The motion for stay is DENIED as to medical benefits in the form of reimbursement to the employee for out of pocket expenses for treatment of mental illness; but GRANTED as to medical benefits in the form of reimbursement of the personal insurer for treatment expenses for mental illness. No request for a *nunc pro tunc* order was made, so our order is effective the date of this decision.

Date: *October 19, 2006* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Marc Stemp, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final decision on this appeal. It becomes effective when filed in the office of the Commission unless proceedings to reconsider it or seek Supreme Court review are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the Commission and all other parties to the proceedings before

the Commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of this appeal, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rule 402. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the Commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the Commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the Commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Memorandum Decision and Order on Motion for Stay Pending Appeal in the matter of Anchorage School District v. Gerald Delkettie; Appeal No.06-028; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *19th* day of October, 2006.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.06-028 was mailed on *10/10/06* to Wagg & Rehbock at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, Wagg, & Rehbock.

Signed *10/19/06*
L. Beard, Deputy Clerk Date