

Case: *State of Alaska, Workers' Compensation Benefits Guaranty Fund vs. Eugene H. Shepard, III and New City Painting, LLC*, Alaska Workers' Comp. App. Comm'n Dec. No. 190 (December 20, 2013)

Facts: Eugene H. Shepard, III (Shepard) was injured when he fell through a basement access panel at a client's home while taping drywall for New City Painting, LLC (New City) on August 8, 2007. On August 13, 2007, he filed an injury report and claim form with the Alaska Workers' Compensation Board (board). Both forms indicated in someone else's handwriting that New City was uninsured. The board served the forms on New City.

On October 10, 2007, attorney Steven Smith (Smith) and Shepard entered into an agreement in which Smith agreed to represent Shepard. The agreement stated in relevant part: "In the event [Shepard] elects to proceed under Workman's [sic] Compensation statutes then the fee will be \$275/hr subject to approval by the W.C. Board." The agreement also provided: "If [Shepard] elects to sue in tort the fee shall be contingent[.]"

On October 11, 2007, at a prehearing conference, the summary indicated that no parties appeared in person or by phone. The summary indicated that the board would not take any action on Shepard's claim at that time.

Shepard sued New City and the homeowner in February 2008. Shepard sought all compensable damages, including those awardable in tort, or in the alternative, workers' compensation benefits. A default judgment for the amount of nearly \$33,400 was entered a year later against New City. Shepard received nothing from New City in satisfaction of this judgment but he was paid \$5,000 from the homeowner's general liability insurance. The summary was served on Shepard and New City.

On December 5, 2011, Shepard filed another workers' compensation claim against New City and the State of Alaska, Workers' Compensation Benefits Guaranty Fund (Fund). Although Smith had been representing Shepard since October 2007, he filed an appearance with the board on September 13, 2012. On October 1, 2012, the Fund filed a petition asserting the Shepard's claim was either time-barred under AS 23.30.105 or that Shepard's claim was barred because he elected to forgo his workers' compensation remedy when he sued New City under AS 23.30.155. After a hearing held December 19, 2012, the board concluded that Shepard's claims were not barred by either AS 23.30.105 or AS 23.30.055. The Fund sought review by the commission.

Applicable law: AS 23.30.055 provides in relevant part:

The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer. . . . However, if an employer fails to secure payment of compensation as required by this chapter, an injured employee . . . may elect to claim compensation under this chapter, or to maintain an action against the employer at law or in admiralty for damages on account of the injury or death. . . .

AS 23.30.075(a) requires employers to carry workers' compensation insurance or provide proof of the employer's financial ability to pay directly the compensation provided for.

AS 23.30.082(c), on the Workers' Compensation Benefits Guaranty Fund, provides:

Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

AS 23.30.110(b) provides in relevant part: "Within 10 days after a claim is filed the board, in accordance with its regulations, shall notify the employer and any other person, other than the claimant, whom the board considers an interested party that a claim has been filed."

AS 23.30.100 provides in relevant part:

(a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.

....

(d) Failure to give notice does not bar a claim under this chapter

....

(2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;

AS 23.30.105(a) provides in relevant part:

The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . .

8 AAC 45.050(e) provides:

A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if, additionally,

(1) within the period provided by AS 23.30.105 for filing a claim, the party to be brought in by amendment has received, under

AS 23.30.100, such notice of the injury that the party will not be prejudiced in defending the claim; and

(2) the party to be joined by the amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Issues: Did the board have substantial evidence to conclude that personnel failed to properly advise the pro se Shepard? Did the board have substantial evidence to conclude the board failed to notify the fund as an interested party? Is Shepard's claim time-barred by AS 23.30.105? Is Shepard's claim barred because he elected to sue in court, rather than seek workers' compensation benefits, under AS 23.30.055?

Holding/analysis: Shepard was represented by an attorney so the board owed no duty to Shepard to advise him. The board lacked substantial evidence to conclude that Shepard was unrepresented until September 2012 because Smith and Shepard entered into an agreement in October 2007. Filing an entry of appearance before the board is not determinative of when the attorney-client relationship began.

The commission concluded that substantial evidence supported that the board should have notified the Fund as an interested party since the board knew that New City was uninsured and that the Fund had responsibility to pay claims against uninsured employers.

AS 23.30.105 does not bar Shepard's claim because it was timely filed. Shepard filed a timely claim against New City and under 8 AAC 45.050(e) the claim could be amended to add the Fund as a party and that amendment would relate back to the time Shepard filed the original claim. The commission concluded that since it was the board's, rather than Shepard's, obligation to provide notice to the Fund, the lack of notice could be excused under AS 23.30.100(d)(2) (notwithstanding 8 AAC 45.050(e)(1)'s requirement that a party brought in by amendment has received notice of the injury). The claimant should not have to bear the consequences of the board's error. The Fund was not prejudiced by the lack of notice because: "The record is devoid of any evidence of prejudice to the Fund as far as its ability to defend itself against Shepard's claim. Moreover, we do not consider the prospect that the Fund may ultimately have to pay him benefits to be prejudicial." Dec. No. 190 at 18. In addition, the second criteria, 8 AAC 45.050(e)(2), was satisfied because the Fund should have been notified as an interested party.

The commission disagreed with the board and concluded that AS 23.30.055 barred Shepard's claim against the Fund. The commission relied on the statutory language ("or") and two Supreme Court cases. In *Ehredt v. DeHavilland Aircraft Co.*, 705 P.2d 446, 451 (Alaska 1985), the Court stated: "[I]f the employer fails to secure payment, the injured employee has the option to claim workers' compensation or to file an action at law." In *Lindsey v. E & E Automotive & Tire Service, Inc.*, 241 P.3d 880, 884 n.3 (Alaska 2010), the Court stated: "Having received workers' compensation benefits from Wesgro, his employer, following the accident, Lindsey was barred from suing Wesgro by the exclusive remedy provision of the Alaska Workers' Compensation Act."

The commission understood *Nickels v. Napolilli*, 29 P.3d 242 (Alaska 2001), as standing “[i]f anything . . . for the proposition that, if an injured worker elects to sue her uninsured employer, but the lawsuit is unsustainable, an option may still be preserved for an administrative remedy before the board. It does not stand for the proposition that the injured employee may pursue both a judicial remedy and an administrative remedy through to conclusion.” Dec. No. 190 at 26-27. In *Nickels*, the Court held that the exclusive remedy provision of AS 23.30.055 barred an injured worker from suing her employer in contract but gave her leave to pursue a workers’ compensation claim.

The commission concluded that the order in which remedies are pursued was not relevant. The commission found persuasive other courts’ reasoning that pursuing a judicial remedy through to judgment bars the recovery of workers’ compensation benefits. Because Shepard obtained a judgment, even though it was unsatisfied, he could not seek workers’ compensation benefits.

To be clear, we hold that an injured employee of an uninsured employer may elect either to pursue an administrative remedy against the employer and/or the Fund, or to pursue a lawsuit against the employer, but may not pursue both, whether simultaneously or sequentially, to conclusion. Once a Final Decision on a claim is obtained from the board or a judgment is obtained in court, whichever comes first, an election has been pursued to finality and the claimant/plaintiff is foreclosed from pursuing the other option any further. Dec. No. 190 at 27.

Note: A petition for review of this decision has been filed with the Alaska Supreme Court.