

Case: *Utility Technologies, Inc. and Liberty Northwest Insurance Company vs. Dale D. King*, Alaska Workers' Comp. App. Comm'n Dec. No. 193 (October 29, 2013)

Facts: Dale King (King) injured his back working for Utility Technologies, Inc. (UT) on April 27, 2009. King had multiple back surgeries. An employer medical evaluator, Dr. Borman, concluded on November 3, 2011, that King was likely to need monthly prescriptions for pain control for the rest of his life and monthly treatment to adjust his pain medications. Dr. Johnston wrote prescriptions for Nucynta semi-monthly and for Zanaflex, a muscle relaxant, at monthly intervals. The cost of 15 days' worth of Nucynta exceeded \$400.

On four dates – May 18, 2012, July 2, 2012, November 2, 2012, and January 4, 2013, – King's prescriptions were not filled upon presentment to the pharmacy due to the insurer's denial. However, all of the prescriptions were authorized and refilled within five to seven days. King filed a claim for benefits.

On September 6, 2013, the board majority concluded that: (1) King was entitled to preauthorized prescription pain and muscle relaxant medications; (2) King was entitled to have his prescriptions filled upon presentment to the pharmacy; (3) UT's failure to refill the prescriptions on the four dates at issue were controversions in fact; and (4) UT would be referred to the Division of Insurance because the controversions were utterly frivolous and in bad faith.

UT appealed and filed a motion for a stay of the board's orders.

Applicable law: AS 23.30.125(c) provides in relevant part:

Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of the compensation payments.

8 AAC 57.100 provides:

(f) To stay continuing future periodic compensation payments, the appellant must demonstrate by affidavit or other evidence

(1) that it would suffer irreparable damage; and

(2) the existence of the probability that the merits of the appeal will be decided adversely to the compensation recipient.

(g) To stay lump sum payments, the appellant must demonstrate by affidavit or other evidence that it would suffer irreparable damage.

AS 23.30.097 provides in relevant part:

(f) An employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter.

(g) Unless the employer controverts the prescription charges the employer shall reimburse an employee's prescription charges under this

chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the prescription charges for the employee.

Municipality of Anchorage v. Adamson, 301 P.3d 569, 578-79 (Alaska 2013) held that future medical benefits are continuing future periodic compensation payments.

Olsen Logging Co. v. Lawson, 832 P.2d 174 (Alaska 1992) explained the balance of hardships approach in terms of evaluating irreparable damage, and concluded that the lesser "serious and substantial questions" standard should apply in considering the likelihood of success on the merits when considering lump-sum awards.

Issues: Should the commission stay the board's orders that King is entitled to preauthorized prescription pain and muscle relaxant medications and to have his prescriptions filled upon presentment to the pharmacy? What standard for granting a stay applied to the board's orders finding controversions in fact and requiring referral to the Division of Insurance for frivolous controversions? Should the commission stay the board's orders on the controversions?

Holding/analysis: On the preauthorizing of prescriptions, the commission concluded that UT was likely to succeed on the merits because the board majority likely erred in failing to consider AS 23.30.097(g), which specifically addressed prescriptions unlike the two provisions that the board considered -- AS 23.30.155(a) (requiring compensation to be paid "promptly") and AS 23.30.097(f) (providing that an "employee may not be required to pay a fee or charge for medical treatment or service provided under this chapter"). The commission observed that "neither §.097(g), nor its implementing regulation, 8 AAC 45.082(d), specifies that an employer/carrier must preauthorize the prescriptions and pay for them upon presentment to the pharmacy. The board's imposition of these requirements here appears to be contrary to the plain wording of the statute and regulation[.]" Dec. No. 193 at 13.

The commission decided that UT would suffer irreparable damage. The only way UT could recoup any overpayment would be through deductions from continuing payments of other benefits. King was still seeking permanent total disability benefits and other medical benefits but the board had not decided these claims. "Therefore, it is problematic whether he will be awarded more benefits from which overpayments can be deducted. These circumstances constitute irreparable damage." *Id.*

The commission applied the balance of hardships approach to decide whether to stay the board's orders concerning the controversions. King would suffer no hardship because the orders did not relate to awards of any kind of benefits to him. But the insurer could face disciplinary action from the Division of Insurance. The "commission concludes that a stay is appropriate where there is no hardship to the employee and some identifiable hardship to the employer or its workers' compensation carrier." *Id.* at 15. Also a stay was warranted because the finding that the controversions were frivolous was based on the board's probably erroneous conclusion that the prescriptions must be preauthorized and filled on presentment to the pharmacy.