

Alaska Workers' Compensation Appeals Commission

Kiel L. Cavitt,
Appellant,

vs.

D & D Services, LLC d/b/a Novus Auto
Glass and Ohio Casualty Insurance
Company,
Appellees.

Final Decision

Decision No. 264 July 8, 2019

AWCAC Appeal No. 18-020
AWCB Decision No. 18-0103
AWCB Case No. 201513001

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0103, issued at Anchorage, Alaska, on October 15, 2018, by southcentral panel members Ronald P. Ringel, Chair, Bronson Frye, Member for Labor, and David Kester, Member for Industry.

Appearances: Keenan Powell for appellant, Kiel L. Cavitt; Martha T. Tansik, Barlow Anderson, LLC, for appellees, D & D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company.

Commission proceedings: Appeal filed November 7, 2018; briefing completed April 5, 2019; oral argument was not requested.

Commissioners: James N. Rhodes, S. T. Hagedorn, and Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Kiel L. Cavitt (Mr. Cavitt) was working as a glazier for D & D Services LLC d/b/a Novus Auto Glass, insured by Ohio Casualty Insurance Company (D & D), when he injured his right elbow falling from scaffolding. On July 20, 2016, the Alaska Workers' Compensation Board (Board) held the first of several hearings. At that hearing, the parties stipulated Mr. Cavitt was injured in the course and scope of his employment with D & D, permanent partial impairment (PPI) benefits had been paid late, Mr. Cavitt was

entitled to a penalty on the late paid PPI, and D & D would pay Mr. Cavitt's attorney \$4,800.00 in fees and costs.¹

The Board next heard Mr. Cavitt's claim on August 2, 2017, and issued a Decision and Order awarding him some benefits and denying others.² This decision was timely appealed to the Alaska Workers' Compensation Appeals Commission (Commission) which remanded the matter to the Board for reconsideration of the award for attorney fees.³

The Board heard on May 15, 2018, additional matters relevant to Mr. Cavitt's claim, and issued an Interlocutory Decision and Order.⁴ The Board again awarded Mr. Cavitt some benefits, including additional attorney fees on remand from the Commission, and denied other benefits. Mr. Cavitt filed a Notice of Appeal on July 20, 2018.⁵ The Commission affirmed the Board's decision denying specific future medical benefits to Mr. Cavitt, and affirmed the finding that D & D had not frivolously or unfairly controverted his claim.⁶

Mr. Cavitt next requested the Board find D & D had untimely paid temporary total disability benefits (TTD) previously awarded to him and owed him a penalty. He also requested an award of attorney fees. After the hearing on the written record on September 27, 2018, the Board held it did not have jurisdiction to rule on the new penalty

¹ See, *Cavitt v. D & D Services, LLC dba Novus Auto*, Alaska Workers' Comp. Bd. Dec. No. 18-0060 at 5, No. 12 (June 25, 2018)(*Cavitt III*). The July 20, 2016, hearing apparently did not result in a published decision and is not before the Commission.

² *Cavitt v. D & D Services LLC, d/b/a Novus Auto Glass*, Alaska Workers' Comp. Bd. Dec. No. 17-0109 (Sept. 13, 2017)(*Cavitt I*).

³ *Cavitt v. D & D Services, LLC d/b/a Novus Auto Glass*, Alaska Workers' Comp. App. Comm'n Dec. No. 248 (May 4, 2018)(*Cavitt II*).

⁴ *Cavitt III*.

⁵ This should have been a Petition for Review since the decision is denoted as an Interlocutory Decision and Order. However, D & D did not oppose the Notice of Appeal and the Commission accepted the matter as an appeal since the issues decided were final dispositions of those issues.

⁶ *Cavitt v. D & D Services LLC d/b/a Novus Auto Glass*, Alaska Workers' Comp. App. Comm'n Dec. No. 259 (Mar. 29, 2019)(*Cavitt V*).

issue since one of the issues on appeal to the Commission was whether a penalty was due on the TTD benefits because D & D had issued an unfair and frivolous controversion.⁷

Mr. Cavitt timely appealed *Cavitt IV* on November 7, 2018, to the Commission. Neither party requested oral argument, and the Commission decides this new appeal on the basis of the parties' briefs. In the meantime, Mr. Cavitt has appealed *Cavitt V* to the Alaska Supreme Court (Court) on the sole issue of entitlement to an award of specific future medical benefits. The issue of a penalty for a frivolous and unfair controversion is now law of the case and the Commission remands *Cavitt IV* to the Board for consideration of whether TTD was late paid. If TTD was late paid, Mr. Cavitt is entitled to the statutorily mandated penalty in AS 23.30.155.

*2. Factual background and proceedings.*⁸

Mr. Cavitt worked for D & D as a glazier. On August 14, 2015, he was working on scaffolding replacing the windshield in a motorhome when he fell off the scaffolding and injured his right elbow.⁹

On August 15, 2015, Kenneth C. Thomas, M.D., performed open reduction and internal fixation surgery, with a radial head arthroplasty and ligament repair.¹⁰ Mr. Cavitt was unable to return to his job at the time of injury for more than 90 days, and an eligibility evaluation for reemployment benefits was started on December 21, 2015.¹¹ Dr. Thomas found Mr. Cavitt medically stable on December 29, 2015, and released him

⁷ *Cavitt v. D & D Services, LLC dba Novus Auto*, Alaska Workers' Comp. Bd. Dec. No. 18-0103 (Oct. 15, 2018)(*Cavitt IV*).

⁸ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

⁹ *Cavitt I* at 2, No. 1.

¹⁰ *Id.* at 3, No. 3.

¹¹ *Id.*, No. 4.

to light-duty work.¹² Since Mr. Cavitt was unable to return to work with D & D in a light-duty capacity, he began working as a pizza delivery driver on January 5, 2016.¹³

Because Mr. Cavitt was medically stable, but in the reemployment process, D & D discontinued TTD benefits and began paying PPI benefits on January 29, 2016, on a biweekly basis.¹⁴ On February 1, 2016, Mr. Cavitt received a seven percent PPI rating based on the injury.¹⁵ On March 8, 2016, Mr. Cavitt was found not eligible for reemployment benefits.¹⁶

At the hearing on July 20, 2016, the parties reached an agreement and stipulated that Mr. Cavitt was injured in the course and scope of his employment with D & D. D & D agreed his PPI was paid late and he was entitled to a penalty. D & D further agreed to pay attorney fees and costs in the amount of \$4,800.00.¹⁷

Mr. Cavitt saw, on December 5, 2016, PA-C Kristin Fredley who noted a fresh abrasion on Mr. Cavitt's right elbow, which he attributed to a fall after being hit by a car.¹⁸ In mid-February 2017, Mr. Cavitt fell on an icy sidewalk while delivering pizza.¹⁹ Mr. Cavitt reported, on March 1, 2017, worsening pain after the fall about two weeks before, and Dr. Kirkham ordered a CT scan of Mr. Cavitt's right elbow.²⁰

On March 8, 2017, PA-C Fredley reviewed the CT scan and determined there had been either chronic or posttraumatic loosening of the prosthesis with "likely posttraumatic changes."²¹ Dr. Kirkham, on March 10, 2017, took Mr. Cavitt off work until March 14,

¹² *Cavitt I* at 3, No. 5.

¹³ *Id.*, No. 6.

¹⁴ *Id.*, No. 7.

¹⁵ *Id.*, No. 8.

¹⁶ *Id.*, No. 9; R. 001567.

¹⁷ *Id.*, No. 12 (apparently no Decision and Order was issued since the parties agreed on a stipulation resolving all issues then in dispute).

¹⁸ *Id.* at 4, No. 15.

¹⁹ *Id.*, No. 16.

²⁰ *Id.*, No. 17.

²¹ *Id.*, No. 18.

2017, and on March 15, 2017, he extended the work restriction until April 15, 2017.²² On March 15, 2017, Dr. Kirkham also noted the CT scan showed loosening of the prosthesis due to acute-on-chronic right elbow pain status post right elbow fracture and dislocation from work injury on August 14, 2015, and right coronoid ORIF and radial head arthroplasty. He opined this was likely related to posttraumatic loosening of the radial head prosthesis on top of his underlying right neuropathic right elbow pain of unclear etiology.²³

R. David Bauer, M.D., on April 26, 2017, examined Mr. Cavitt for an employer's medical evaluation (EME), and concluded the most significant factor in bringing about Mr. Cavitt's current need for medical treatment was the 2015 work incident. Neither the motor vehicle accident nor the February fall were substantial factors in his need for ongoing medical treatment. Dr. Bauer stated Mr. Cavitt required revision surgery for the prosthesis and was not medically stable.²⁴

On January 25, 2018, Mr. Cavitt saw Dr. Bauer for a second EME. In addition to examining him, Dr. Bauer reviewed medical records dated after his April 26, 2017, EME. Dr. Bauer's diagnosis was unchanged since his April 2017, EME report, and he continued to find the work injury was the substantial cause of Mr. Cavitt's disability and need for medical treatment. He also found the treatment to date was reasonable and necessary. Dr. Bauer found Mr. Cavitt reached medical stability as of the date of his examination and the only further treatment needed was a home exercise program and continued use of his elbow brace. Dr. Bauer rated Mr. Cavitt with an eight percent PPI.²⁵

On May 4, 2018, the Commission issued *Cavitt II* affirming denial of the compensation rate adjustment, the denial of a penalty, and the denial of a finding of an unfair or frivolous controversion. The Commission remanded the issue of attorney fees

²² *Cavitt I* at 4, No. 19.

²³ *Id.*, No. 20.

²⁴ *Id.* at 5, No. 24.

²⁵ *Cavitt III* at 12-13, No. 62.

for “a determination, among other things, of the time involved for Mr. Cavitt’s request” for ongoing TTD.²⁶

The Board heard additional matters relevant to Mr. Cavitt’s claim on May 15, 2018, and issued an Interlocutory Decision and Order.²⁷ The Board ordered D & D to pay any past medical bills pursuant to the Alaska Workers’ Compensation Act (Act) and ordered it to pay future medical costs in accordance with the Act. Both *Cavitt I* and the parties’ stipulation established the compensability of Mr. Cavitt’s injury as occurring within the course and scope of his employment with D & D. The Board found D & D must provide medical treatment “which the nature of the injury or the process of recovery requires.”²⁸

Mr. Cavitt’s claim for past TTD from February 13, 2018, through April 12, 2018, was granted, and the Board ordered any future TTD to be paid in accordance with the Act. His claim for penalties was denied. Mr. Cavitt was awarded interest on TTD benefits from February 13, 2018, through April 12, 2018, and on any late paid medical bills. He was awarded attorney fees and costs in the amount of \$35,966.63, as well as an additional \$2,968.90 related to *Cavitt I*.²⁹

Mr. Cavitt timely filed a Notice of Appeal on July 20, 2018. He claimed the Board erred in denying him specific future medical treatment recommended by his treating physician, Dr. Thomas, including annual check-ups and lifetime care, as well as failing to order future surgeries he might need. He also asserted the Board erred in failing to award him penalties on past medical benefits and late-paid TTD.

D & D paid Mr. Cavitt the TTD from February 13, 2018, through April 12, 2018, on May 22, 2018.³⁰ On July 5, 2018, Mr. Cavitt filed a claim seeking a penalty on TTD from February 23, 2018 [*sic*], through April 12, 2018, because it was not paid by May 10, 2018,

²⁶ *Cavitt III* at 16, No. 84.

²⁷ *Id.* at 1.

²⁸ *Id.* at 44-45.

²⁹ *Id.*

³⁰ *Cavitt IV* at 3, No. 8.

and he claimed interest and attorney fees.³¹ On July 13, 2018, Mr. Cavitt filed another claim seeking penalties, interest, and attorney fees on the basis D & D had not timely paid the attorney fees and costs awarded in *Cavitt II*.

On July 20, 2018, Mr. Cavitt appealed *Cavitt III* to the Commission.³² One issue on appeal was whether *Cavitt III* erred in denying penalties on TTD from February 13, 2018, through April 12, 2018, on the basis of an unfair and frivolous controversion.³³

At the August 29, 2018, prehearing conference, the parties stated they had resolved Mr. Cavitt's July 13, 2018, claim for late-paid attorney fees and costs. They further agreed Mr. Cavitt's claim for penalty and interest on TTD from February 23, 2018, through April 13, 2018, his claim for penalty and interest on the medical provider's bill, and his claim for attorney fees and costs should be heard on the written record on September 27, 2018.³⁴

The Board issued *Cavitt IV* on October 15, 2018, declining to hear the issue of a penalty on late paid TTD, asserting that the issue of a penalty for an unfair and frivolous controversion was pending before the Commission so it had no jurisdiction to decide a penalty under AS 23.30.155. Mr. Cavitt timely appealed this decision to the Commission. Subsequent to the Board's decision, the Commission issued *Cavitt V* on March 29, 2019, affirming the Board on the issue of specific future medical benefits and the finding that there was no frivolous and unfair controversion.³⁵ Mr. Cavitt appealed *Cavitt IV* to the Court on the sole issue of the failure to award specific future medical benefits. He did not ask the Court to address the issue of a frivolous and unfair controversion.³⁶ The issue

³¹ *Cavitt IV* at 3, No.9.

³² *Id.* at 4, No. 12.

³³ *Id.*

³⁴ *Id.*, No. 13.

³⁵ *Cavitt V*.

³⁶ Cavitt Statement of Points on Appeal, Alaska Supreme Court No. S-17441 (Apr. 25, 2019).

of whether D & D frivolously and unfairly controverted Mr. Cavitt's benefits was resolved by *Cavitt V* and is law of the case.

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.³⁷ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.³⁸ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."³⁹ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁴⁰ The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.⁴¹

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁴² The Commission, when interpreting a statute, adopts "the rule of law that is most persuasive in light of precedent, reason, and policy."⁴³

³⁷ AS 23.30.128(b).

³⁸ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

³⁹ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-89 (Alaska 1984)).

⁴⁰ AS 23.30.122.

⁴¹ AS 23.30.128(b); AS 23.30.122.

⁴² AS 23.30.128(b).

⁴³ *Guin v. Ha*, 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

4. Discussion.

Mr. Cavitt asserted D & D did not pay timely the TTD awarded by the Board in *Cavitt II*. He asked the Board to find the payment was late and to require D & D to pay the statutorily mandated penalty. D & D opposed, claiming that the issue of a penalty for a frivolous and unfair controversion was pending before the Commission, and the Board had no jurisdiction to hear the penalty issue because an adverse ruling from the Commission would potentially subject it to a double penalty. The Board agreed and declined to hear the late payment penalty issue, saying it had no jurisdiction.⁴⁴ Mr. Cavitt, on appeal, asserts the Board did have jurisdiction.

In *Fischback & Moore of Alaska, Inc. v. Lynn*, the Court discussed the general rule that “when an order of an administrative agency is appealed to a court, the agency’s power and authority in relation to the matter is suspended as to questions raised by the appeal.”⁴⁵ However, the Court then added that if there is no conflict with the proper exercise of the Court’s jurisdiction, then “there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred on it by law.”⁴⁶

Here, the Board erred in construing the issue on appeal to the Commission to be the issue of a penalty. The actual issue on appeal to the Commission in *Cavitt V* was whether D & D had unfairly and frivolously controverted his benefits. If so, Mr. Cavitt asserted he was entitled to a penalty. The issue before the Board in *Cavitt IV* was whether Mr. Cavitt was entitled to a penalty for late paid TTD pursuant to AS 23.30.155. Whether a penalty was due for alleged late payment of benefits is not the same issue as whether the employer had frivolously and unfairly controverted benefits. There was no conflict with the Commission’s jurisdiction to decide the issue of whether a controversion was frivolous and in bad faith. A penalty for late payment of benefits is distinct and mandatory.

⁴⁴ *Cavitt IV*.

⁴⁵ *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174, 176 (Alaska 1965).

⁴⁶ *Id.*

AS 23.30.155 provides for the payment of compensation when it is due. "If compensation payable under the terms of an award is not paid within 14 days after it becomes due, there shall be added to that unpaid compensation an amount equal to 25 percent of the unpaid installment." The penalty is to be paid at the same time as the late payment of compensation.⁴⁷ If compensation payable without an award is not paid within seven days after it becomes due "there shall be added to the unpaid installment an amount equal to 25 percent of the installment."⁴⁸ These directives are self-executing and mandatory.

"There is no discretion to excuse a late payment, no matter how blameless the insurer may be. The legislature chose a bright-line rule, we think wisely, to force insurers to take every possible step to ensure that a check is mailed promptly. Because we hold that the payment obligation springs up again when a check becomes non-negotiable, even if it was timely mailed, these same bright-line rules must apply to an insurer's obligation to ensure payment within fourteen days after the stop payment became effective."⁴⁹

On March 29, 2019, the Commission issued *Cavitt V*, which affirmed the Board's finding that D & D had not frivolously controverted Mr. Cavitt's claim. On April 25, 2019, Mr. Cavitt appealed *Cavitt V* to the Court on the sole issue of whether the Commission "erred in affirming the Board's order regarding future medical benefits."⁵⁰ The issue of a frivolous controversion is not a point on appeal to the Court. Therefore, the Commission's decision on the issue of a frivolous controversion is now law of the case.

At the time of the hearing, the Board had jurisdiction to hear the question of whether D & D paid the ordered TTD untimely. The penalty in AS 23.30.155 is distinct and separate from the issue of a penalty where there has been a frivolous and unfair

⁴⁷ AS 23.30.155(f).

⁴⁸ AS 23.30.155(e).

⁴⁹ *American Int'l Group v. Carriere*, 2 P.3d 1222, 1225 (Alaska 2000)(citation omitted).

⁵⁰ Cavitt Statement of Points on Appeal, Alaska Supreme Court No. S-17441, (Apr. 25, 2019).

controversion. Under AS 23.30.155, when a payment of a benefit is made late, the penalty is to be paid automatically as part of the payment of the late compensation. "If any installment of compensation payable . . . is not paid [timely], there shall be added to the unpaid installment an amount equal to 25 percent of the installment."⁵¹ Similar language is in subsection (f) for late payment of compensation that is subject to terms of an award.⁵² This penalty is mandatory and self-executing. It is required whenever a benefit is not paid on time.

If the Commission had found that D & D's controversion was frivolous and unfair, whether D & D would have owed a penalty after paying a penalty for late paid benefits could have been addressed by the Board on remand.

The matter is now remanded to the Board to ascertain whether D & D failed to pay timely the TTD the Board awarded Mr. Cavitt. If D & D failed to pay timely the TTD, then the mandatory penalty must be paid, pursuant to another Board order.

5. Conclusion.

The Commission REVERSES the Board and REMANDS this matter for actions consistent with this decision.

Date: 8 July 2019 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

⁵¹ AS 23.30.155(e).

⁵² AS 23.30.155(f).

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal 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 AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of a typographical error, this is a full and correct copy of Final Decision No. 264, issued in the matter of *Kiel L. Cavitt vs. D & D Services, LLC d/b/a Novus Auto Glass and Ohio Casualty Insurance Company*, AWCAC Appeal No. 18-020, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 8, 2019.

Date: July 11, 2019



Signed

K. Morrison, Appeals Commission Clerk