

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JERRY S. PHILLIPS,) INTERLOCUTORY
) DECISION AND ORDER &
Claimant,) NOTICE TO JOIN
)
v.) AWCB Case No. 201415973
)
RUSTY'S TOWING,) AWCB Decision No. 15-0062
)
Defendant.) Filed with AWCB Anchorage, Alaska
) On May 27, 2015
)

The Alaska Workers' Compensation Benefits Guaranty Fund's (the fund) April 9, 2015 petition to join potentially liable employers was heard on May 26, 2015, in Anchorage, Alaska, a date selected on April 16, 2015. Velma Thomas appeared telephonically for the fund. There were no appearances for Jerry S. Phillips (Claimant) or for Rusty's Towing (Rusty's), Kenneth Dietz (Dietz), K&K Holdings, LLC (K&K) or Greatland Towing (Greatland). There were no witnesses. Since there was concern over proper service and notice, the panel issued an oral order continuing the hearing and decided to issue a "Notice to Join." This decision examines the continuance order and the decision to provide all current and putative parties with a "Notice to Join." The record closed at the hearing's conclusion on May 26, 2015.

ISSUES

At hearing, the fund contended all parties and potential parties had adequate notice of this procedural hearing. Therefore, even though no other parties participated and none could be reached by telephone, the fund contended the hearing should proceed on its petition to join.

As no other party or potential party appeared at hearing, their positions on the continuance issue are not known. An oral order continued the hearing.

1) Was the oral order continuing the hearing correct?

The fund contends all potentially liable defendants should be joined as parties to this case. Therefore, the fund contends K&K, its only owner and member Dietz, and Greatland should all be joined as parties.

As no other party or potential party appeared at hearing, their positions on the joinder issue are not known. To save time and expense, the panel on its own motion decided to issue a decision and order including a “Notice to Join” to all current and putative parties.

2) Was the decision to issue a “Notice to Join” to all current and prospective parties correct?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

- 1) On August 12, 2014, Claimant reported a work-related injury occurred on August 5, 2014. Claimant said he was pushing a truck at a garage, his leg lost traction and he slipped causing pain in his spine. Claimant listed his employer as Greatland and Rusty’s. (Employee Report of Occupational Injury or Illness, September 29, 2014).
- 2) On September 2, 2014, Claimant filed a claim for various benefits arising from his August 5, 2014 injury, listing only Rusty’s as his employer. Claimant filed this claim because he had heard nothing from any insurance company regarding his work injury, and needed benefits. The division served this claim on Claimant and Rusty’s. (Workers’ Compensation Claim, September 2, 2014).
- 3) On September 15, 2014, the division re-served the claim on Claimant and Alaska National Insurance Company (Alaska National), an insurer believed to have insured Rusty’s at the time of this injury. (*Id.*).
- 4) On September 19, 2014, the division re-served the claim on Claimant and Liberty Northwest Insurance (Liberty), an insurer also thought to have insured Rusty’s at the time of Claimant’s injury. (*Id.*).

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- 5) On October 2, 2014, the division served a prehearing conference notice on Claimant and Liberty. (Prehearing Notice, October 2, 2014).
- 6) On October 10, 2014, Claimant called the division stating he had been evicted from his home and was living in his truck. He was angry and could not understand why this process was taking so long. (ICERS event, October 10, 2014).
- 7) On October 14, 2014, only Claimant and Liberty's attorney appeared at the prehearing conference. The designee explained Rusty's was not insured at the time of Claimant's injury and advised him to speak with a workers' compensation technician, who assisted Claimant in filing a petition to have the fund joined as a party. (Prehearing Conference Summary, October 14, 2014).
- 8) On October 14, 2014, Claimant petitioned to join the fund as a party to his claim. (Petition, October 14, 2014).
- 9) Apparently, neither Alaska National nor Liberty insured Rusty's or any other putative employer at the time of Claimant's injury. (Observations and inferences drawn from all the above).
- 10) On October 14, 2014, the division served another prehearing conference notice on Liberty, Rusty's, Claimant, Liberty's attorney and the fund. (Prehearing Notice, October 14, 2014).
- 11) On November 5, 2014, in response to the October 14, 2014 notice, Liberty's attorney, Dietz, Claimant, Thomas, Doug Love with the division's Special Investigations Unit, and Joanne Pride the fund's adjuster, all appeared either in person or telephonically at a prehearing conference. The parties discussed the case's status. Notwithstanding their attendance, it is unclear how anyone other than Claimant, Liberty's attorney and the fund had notice of the prehearing conference, given other attendees' lack of notice. (Prehearing Conference Summary, November 5, 2014).
- 12) On March 10, 2015, the division served a prehearing conference notice on Liberty, its attorney, Rusty's, Claimant, the fund and Love. (Prehearing Notice, March 10, 2015).
- 13) On March 31, 2015, in response to the March 10, 2015 notice, Liberty's attorney, Thomas, Love and Pride appeared either in person or telephonically at a prehearing conference. The designee called Claimant and Dietz and left voicemail messages but neither participated in the prehearing conference. Liberty's attorney requested Liberty's release from the proceedings as it did not insure the risk on August 5, 2014. (Prehearing Conference Summary, March 31, 2015).
- 14) On April 2, 2015, the division served a prehearing conference notice on Liberty, its attorney, Claimant, the fund, the fund's adjuster, and Love. (Prehearing Notice, April 2, 2015).

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15) On April 10, 2015, the fund filed a petition to join K&K and Dietz as parties to Claimant's case. The fund served this petition on Claimant, Rusty's, Liberty, Liberty's attorney, Love and the fund's adjuster. The fund did not serve the petition on either K&K or Dietz. Though Dietz is reputed to own Rusty's and K&K, the fund served the petition on Rusty's at an address different from the address available for both K&K and Dietz. (Petition, April 9, 2015; observations).

16) Dietz and K&K were not properly served with the April 9, 2015 petition. (Experience, judgment and inferences drawn from the above).

17) On April 16, 2015, in response to the April 2, 2015 notice, Dietz, Claimant, Liberty's attorney, Thomas, Love and Pride all appeared at a prehearing conference. The parties all agreed there was no evidence Liberty insured any putative employer at the time of Claimant's work injury. Liberty's lawyer was to draft a stipulation to dismiss Liberty as a party. Claimant had filed a hearing request and was ready to present his case. Other parties stated they had not received discovery from Claimant and the designee discovered Claimant had filed his discovery responses with the board but had not properly served other parties. The parties agreed to exchange discovery and stipulated to a procedural hearing on May 26, 2015, on the fund's April 9, 2015 petition to join K&K and Dietz as parties in this case. The parties also agreed to a merits hearing on Claimant's claim on June 23, 2015. The prehearing conference summary expressly listed the fund's "April 10, 2015" petition to join as the issue for the first hearing, and did not record any comment from any party stating they had not been served with the subject petition. (Prehearing Conference Summary, April 16, 2015).

18) On April 24, 2015, the division served notice for the May 26, 2015 preliminary hearing on Rusty's, Claimant, Liberty's lawyer, Love, Thomas and the fund's adjuster. The division did not serve the notice on Dietz or on K&K. The division served the hearing notice on Liberty's attorney, the fund's adjuster and Claimant by certified mail; all three parties signed and returned the green card. Other listed parties were served by regular mail only. (Hearing Notice, April 24, 2015).

19) Dietz and K&K were not properly served with the April 24, 2015 hearing notice for the May 26, 2015 hearing. (Experience, judgment and inferences drawn from all the above).

20) On May 22, 2015, the designated chair approved a stipulation dismissing Liberty from this case. (Parties' Stipulation to Release and Dismiss Liberty Mutual, May 22, 2015).

21) On May 26, 2015, only Thomas appeared telephonically at the preliminary hearing. The designated chair called Dietz and Claimant and left voicemail messages on Claimant's phone

number of record and on two phone numbers of record for Dietz. The panel waited approximately 10 minutes and when neither Claimant nor Dietz called the numbers provided on the voicemail messages, the hearing proceeded without them. Thomas argued the hearing should proceed on the fund's petition to join Dietz and K&K. Thomas argued the last prehearing conference made all parties aware there was a preliminary hearing scheduled on the fund's April 9, 2015 petition to join. However, the designee observed the petition was not served on either party to be joined -- Dietz or K&K. Further, the designee noted the April 24, 2015 hearing notice for the May 26, 2015 hearing was not served on either Dietz or K&K by regular or certified mail. Given the above, the panel issued an oral order continuing the May 26, 2015 hearing. The panel also decided to issue a decision and order including a "Notice to Join" to all parties and putative parties to this case. This would include current parties and Dietz, K&K and Greatland, the latter an entity to which Claimant had made reference in his pleadings as a possible employer. (Record, May 26, 2015).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

- 1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

AS 23.30.005. Alaska Workers' Compensation Board.

. . . .

(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.110(c). Procedure on claims. . . .

. . . .

(c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . .

8 AAC 45.040. Parties. . . .

. . . .

(d) Any person against whom a right to relief may exist should be joined as a party. . . .

. . . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or

(2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim. . . .

The Alaska Supreme Court said in *Sherrod v. Municipality of Anchorage*, 803 P.2d 874, 876 (Alaska 1990): "AS 23.30.110 requires the board to provide a hearing to an 'interested party.'"

8 AAC 45.050. Pleadings. . . .

. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.060. Service. . . .

. . . .

(c) A party shall file proof of service with the board. Proof of service may be made by

(1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party;

(2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or

(3) letter of transmittal if served by mail.

(d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if

required. The board will, in its discretion, refuse to consider a document when proof of its service does not conform to the requirements of this subsection.

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

8 AAC 45.070. Hearings. . . .

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
- (2) dismiss the case without prejudice; or
- (3) adjourn, postpone, or continue the hearing.

ANALYSIS

1) Was the oral order continuing the hearing correct?

All potential parties should be joined as parties to a claim. *Sherrod*; 8 AAC 45.040. Though they appear to have discussed the matter at the April 16, 2015 prehearing conference, not all parties were properly served with the fund's April 9, 2015 petition. It is unclear why some "parties" even participated in prehearing conferences, as the record shows many attendees were never served with prehearing conference notices. The two entities the fund initially sought to join as parties to this case, Dietz and K&K, were not served with the petition according to the certificate of service the fund placed on its petition. At hearing, the fund identified a third putative employer, Greatland, which had also never been served with the petition to join. Furthermore, only Claimant, Liberty and the fund were served with the April 24, 2015 hearing notice by certified mail as required by law for the May 26, 2015 hearing. All three entities served by certified mail signed and returned the green card. But Dietz, K&K and Greatland were not served with the hearing notice by either regular or certified mail. *Rogers & Babler*. Liberty

had been dismissed, so it understandably did not appear at hearing. The fund's representative appeared, but Claimant did not. Neither Claimant nor Dietz could be reached by telephone.

If all parties had received statutory notice, and if only Claimant had failed to appear, the hearing on the fund's petition could have proceeded as Claimant received notice, signed and returned the green card, but failed to appear at hearing. 8 AAC 45.070(f). However, the record shows the two parties initially sought to be joined, plus an additional party mentioned at hearing, were never served with the fund's April 9, 2015 petition. Similarly, none of these putative employers were served with adequate hearing notice. AS 23.30.110(c); 8 AAC 45.060(e). Under the circumstances, it would have been unfair to go forward with the hearing on the petition to join or impose party status on entities not properly served with the petition or the hearing notice. AS 23.30.001(1). Therefore, the oral order continuing the hearing was correct.

2) Was the decision to issue a "Notice to Join" to all current and prospective parties correct?

The fund did not properly serve all putative parties with its petition to join. *Rogers & Babler*; 8 AAC 45.060(c), (d). At hearing, the fund raised Greatland as another potential employer. Rather than make the fund re-serve its petition on all current and putative parties, thus delaying this matter further, this decision will include a "Notice to Join" to all current and potential parties and give them a chance to respond. 8 AAC 45.040(f)(2). This procedure is faster, more efficient, simpler and more summary than alternative methods and was therefore correct. AS 23.30.001(1); AS 23.30.005(h). Current and potential parties may object to joinder by filing, and serving on all other parties, an objection to the fund's joinder petition within 20 days from the date this decision is issued. 8 AAC 45.040(g)-(j). Current and prospective parties may also stipulate to joinder. 8 AAC 45.050(f).

CONCLUSIONS OF LAW


- 1) The oral order continuing the hearing was correct.
- 2) The decision to issue a "Notice to Join" to all parties and prospective parties was correct.

ORDER

- 1) The fund's April 9, 2015 petition to join is denied as moot.
- 2) **The current and potential parties are hereby given the following "Notice to Join": Dietz, K&K and Greatland will be joined as parties to this case unless, within 20 days after service of this decision and order and "Notice to Join," Dietz, K&K and Greatland file, and serve on all parties, an objection to the joinder.**
- 3) **If Dietz, K&K or Greatland fail to timely object to joinder in accordance with 8 AAC 45.040, their right to object to joinder is waived and those entities failing to object are joined without further action.**
- 4) Dietz, K&K and Greatland may object to joinder based on a defense that would bar Claimant's claim against them, if a claim were filed against Dietz, K&K or Greatland.
- 5) As an alternative to either not responding to this "Notice to Join," or objecting to joinder, Dietz, K&K and Greatland, along with current parties, may stipulate to joinder.
- 6) As the three, above-referenced potential parties' positions on joinder are not yet known, and if joined they may need to prepare for hearing, the June 23, 2015 hearing will remain on the hearing docket. However, the current parties and all putative parties are advised the June 23, 2015 hearing date will be used as a preliminary hearing to address the joinder issue, if necessary, and will not be used to decide Claimant's pending claim on its merits. A prompt hearing on Claimant's pending claim will be scheduled at the June 23, 2015 hearing.
- 7) The division is directed to serve this decision and order, and re-notice the June 23, 2015 hearing, with proper service on all parties and putative parties.

Dated in Anchorage, Alaska on May 27, 2015.

ALASKA WORKERS' COMPENSATION BOARD



William Soule, Designated Chair

Michael O'Connor, Member

Patricia Vollendorf, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory of other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order and Notice to Join in the matter of Jerry S. Phillips, Claimant v. Rusty's Towing, defendant; Case No. 201415973; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 27, 2015.

Elizabeth Pleitez, Office Assistant