

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION FOR)
A FINDING OF THE FAILURE TO) FINAL DECISION AND ORDER
INSURE WORKERS' COMPENSATION) ON RECONSIDERATION &
LIABILITY, AND ASSESSMENT OF A) MODIFICATION
CIVIL PENALTY AGAINST,)
) AWCB Case No. 700004148
)
K6 BUILDING SOLUTIONS) AWCB Decision No. 13-0114
& MICHAEL S. KENNEDY)
) Filed with AWCB Anchorage, Alaska
Employer,) on September 16, 2013
Defendants.)
)
_____)

K6 Building Solutions and Michael S. Kennedy's July 1, 2013 petition for reconsideration of *In re K6 Building Solutions & Michael S. Kennedy*, AWCB Decision No. 13-0067 (June 19, 2013) (*K6 I*), was heard on August 27, 2013, in Anchorage, Alaska. This hearing date was selected on August 2, 2013. Investigator Christine Christensen of the Alaska Division of Workers' Compensation (division) Special Investigations Unit represented the division at the May 2, 2013 hearing on the division's petition for finding of failure to insure. Michael S. Kennedy, d/b/a K6 Building Solutions (collectively Employer) represented himself. This petition was heard on the basis of the written record, which closed at the hearing's conclusion on August 27, 2013.

ISSUE

A Decision and Order Errata to AWCB Decision No. 13-0083 (August 2, 2013) ordered Employer to file materials supporting his July 1, 2013 petition for reconsideration of *In re K6 Building Solutions & Michael S. Kennedy*, AWCB Decision No. 13-0067 (June 19, 2013), by close of business August 16, 2013. Employer made no filing.

Should K6 I be reconsidered under AS 44.62.540 or modified under AS 23.30.130?

FINDINGS OF FACT

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

- 1) On June 19, 2013, *K6 I* was issued, holding: Mr. Kennedy, d/b/a K6 Building Solutions, was an “employer” employing at least three “employees” from April 27, 2011 to December 31, 2012; Michelle Kennedy was an employee but for purposes of assessing a civil penalty the days she worked for employer were not considered; Employer was assessed a \$16,457.72 civil penalty for failure to insure for workplace injuries from April 27, 2011 to December 31, 2012; and Mr. Kennedy was issued a stop order for K6 Building Solutions, Kennedy Woodworks, and any other business he owns or operates (*K6 I* at 31-32; June 19, 2013).
- 2) At hearing on May 2, 2013, Employer testified he believed the hearing had been fair and just (*K6 I* at 10).
- 3) On July 1, 2013, Employer timely filed a petition stating, “We ask that the board reconsider decision against K6 Building Solutions. We ask them to review all phone calls between K6 and Workers Comp” (Petition, July 1, 2013).
- 4) The division is aware of two recorded phone conversations with Employer: the December 18, 2012 prehearing; and a June 21, 2013 phone call between Chief Investigator Rhonda Gerharz and Michelle Kennedy, following service of *K6 I* (Record).
- 5) It was unclear from Employer’s petition whether he was requesting reconsideration under AS 44.62.540 or modification under AS 23.30.130 (Experience, judgment, observations and inferences).
- 6) On July 17, 2013, Interlocutory Decision and Order No. 13-0083 (*K6 II*) was issued, granting Employer’s request for reconsideration. Employer was ordered to file written materials to

support its petition by close of business July 31, 2013. The division was ordered to file its reply by close of business August 14, 2013 (*K6 II* at 5).

7) On July 22, 2013, the certified mail version of *K6 II* was returned to the division as undeliverable. *K6 II* had mistakenly been sent to Employer's former address (Record).

8) On August 2, 2013, a Decision and Order Errata (*K6 II Errata*) was issued, extending Employer's deadline to file reconsideration materials to close of business August 16, 2013, and the division's deadline to file an opposition to close of business August 23, 2013. *K6 II Errata* was served on Employer at both its former and current addresses (*K6 II Errata*, Record).

9) On August 3, 2013, the certified mail version of *K6 II Errata* sent to Employer's address of record was available for post office pickup in Wasilla, Alaska (USPS Track & Confirm website, August 28, 2013).

10) On August 6, 2013, the certified mail version of *K6 II Errata* sent to Employer's former address was returned as undeliverable (Record).

11) On August 23, the division filed its opposition to Employer's petition for reconsideration (Opposition, August 23, 2013).

12) Neither the certified nor the first class versions of *K6 II Errata* sent to Employer's address of record was returned as undeliverable (Record).

13) Employer did not file any reconsideration materials, nor did he communicate with the division about his petition in any way (Record).

PRINCIPLES OF LAW

AS 23.30.130. Modification of awards.

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

8 AAC 45.060. Service.

...

(b) . . . Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

. . .

(g) If after due diligence, service cannot be done personally, electronically, by facsimile, or by mail, the board will, in its discretion, find a party has been served if service was done by a method or procedure allowed by the Alaska Rules of Civil Procedure.

While service is complete upon mailing with sufficient postage to the parties last known address, the board has repeatedly found parties have received actual notice of hearings when “although the return receipt from the notice sent via certified mail had not been received [by the board], neither had the notice sent via first class mail been returned as undeliverable.” See, e.g., *Mendez v. Sundance Raceways*, AWCB 93-0173 at 3 (July 7, 1993); *Woodards v. Four-Star Terminals, Inc.*, AWCB 95-0167 at 3 (June 23, 1995); and *McCarroll v. Catholic Community Services*, AWCB 97-0001 at 5 (January 6, 1997), citing *Mendez*.

8 AAC 45.150. Rehearings and modification of board orders.

(a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

(b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

AS 44.62.540. Reconsideration.

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted. . . .

ANALYSIS

Should K6 I be reconsidered under AS 44.62.540 or modified under AS 23.30.130?

Prior decisions found parties received actual notice when “although the return receipt from the notice sent via certified mail had not been received [by the board], neither had the notice sent via first class mail been returned as undeliverable.” *Mendez; Woodards; McCarroll*. Here the certified mail version of *K6 II Errata* was sent to Employer’s address of record. It was available for post office pickup on August 3, 2013, and the first class mail version was not returned as undeliverable. Employee is found to have been properly served under 8 AAC 45.060.

Because Employer's intent in his July 1, 2013 petition for reconsideration of *K6 I* was somewhat vague, *K6 II* explained the difference between a petition for reconsideration and a request for modification, and directed Employer to file and serve upon the board written supporting materials. *K6 II Errata*, issued due to improper service of *K6 II*, established Employer's filing deadline as August 16, 2013.

K6 II provided Employer the opportunity to file arguments and evidence to clarify and support his petition for a "review all phone calls between K6 and Workers Comp." Employer was directed to specify which law, regulation or facts he believes *K6 I* overlooked, and explain why he believes the alleged legal or factual errors substantially prejudiced his rights and led to an incorrect conclusion. Employer could have, for example, specified the date and content of the conversations it wanted reviewed, and how that evidence would affect the existing board order.

However Employer did not supplement the record or communicate with the division about his petition in any way. Due to the lack of supporting arguments or evidence, Employer's petition will be denied and dismissed, and the decision and order in *K6 I* will stand as written.

CONCLUSION OF LAW

K6 I will not be reconsidered under AS 44.62.540 or modified under AS 23.30.130.

ORDER

- 1) Employer's July 1, 2013 petition for reconsideration of the record of AWCB Decision and Order No. 13-0067 (June 19, 2013) is denied and dismissed.
- 2) AWCB Decision and Order No. 13-0067 is reaffirmed and remains in full force and effect.

Dated in Anchorage, Alaska on September 16, 2013.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Robert Weel, Member

Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order on Reconsideration in the matter of Michael S. Kennedy, d/b/a K6 Building Solutions, uninsured/defendant, Case No. 700004148, dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties on September 16, 2013.

Kimberly Weaver, Office Assistant