

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

PAUL D. PIETRO,)
)
Employee,) INTERLOCUTORY
Petitioner,) DECISION AND ORDER ON
) RECONSIDERATION & MODIFICATION
v.)
) AWCB Case No. 199530232
UNOCAL CORPORATION,)
) AWCB Decision No. 13-0166
Employer,)
Respondent.) Filed with AWCB Anchorage, Alaska
) on December 20, 2013
)
_____)

Paul Pietro's (Employee) December 11, 2013 Petition for Reconsideration, Modification and/or Clarification was heard on the written record on December 20, 2013, a date selected on December 20, 2013. Attorney Michael Jensen represents Employee. Attorney Richard Wagg represents Unocal Corporation (Employer). There were no witnesses. The record closed when the panel met to deliberate on December 20, 2013.

ISSUES

Employee contends *Pietro v. Unocal Corporation*, AWCB Decision No. 13-0156 (December 3, 2013) (*Pietro IX*), erred by excluding 207.30 hours of paralegal fees from its award because Employee failed to file affidavits from the paralegals, made a factual error in its attorney and paralegal fee calculations, and was not clear in its attorney fee award. It seeks reconsideration of the legal ruling excluding paralegal fees and modification of these alleged factual errors and clarification of the attorney fee award.

Employer has not yet responded to Employee's petition. Thus, its position on the petition is not yet known.

Should Employee's December 11, 2013 petition be granted for purposes of additional briefing and argument concerning attorney and paralegal fees awarded in *Pietro IX*?

SUMMARY OF DECISIONS

Pietro v. Unocal Corp., AWCB Decision No. 05-0287 (November 4, 2005) (*Pietro I*), held Employee's "peripheral neuropathy" was not work-related and denied Employee's request for medical care and disability. It did not consider whether or not Employee was "economically disabled" (*id.* at 26).

Pietro v. Unocal Corp., AWCB Decision No. 05-0317 (November 30, 2005) (*Pietro II*), denied Employee's request for reconsideration of *Pietro I*.

Following *Pietro II*, Employee appealed to the superior court. The court stayed the appeal to permit review of Employee's post-*Pietro II* petition for modification, which he filed based upon new evidence of "dermatological issues." The superior court eventually affirmed *Pietro I* and *II*.

Pietro v. Unocal Corp., AWCB Decision No. 07-0260 (August 27, 2007) (*Pietro III*), heard Employee's petition for modification of *Pietro I* and *Pietro II*, and his October 11, 2006 claim for benefits related to basal cell carcinoma and melanoma. *Pietro III* denied the modification petition but did not rule on the cancer claim (*Pietro III* at 22-23).

Pietro v. Unocal Corp., AWCB Decision No. 07-0300 (September 28, 2007) (*Pietro IV*), addressed Employee's petition for reconsideration, modification, or clarification of *Pietro III*. Employee contended *Pietro III* failed to rule on his cancer claim. *Pietro IV* granted Employee's petition and ordered oral argument.

Pietro v. Unocal Corp., AWCB Decision No. 08-0029 (February 22, 2008) (*Pietro V*), denied Employee's petition for reconsideration, modification, or clarification of *Pietro III* and denied Employee's cancer claim (*Pietro V* at 8).

PAUL D PIETRO v. CHEVRON CORP

Pietro v. Unocal Corp., 233 P.3d 604 (Alaska 2010), reversed and remanded *Pietro II* with directions for the fact-finders to consider and analyze lay evidence describing Employee's arsenic exposure. The court also directed the fact-finders to decide whether Employee's peripheral neuropathy began before his rheumatoid arthritis.

Pietro v. Unocal Corp., AWCB Decision No. 10-0199 (December 10, 2010) (*Pietro VI*), examined the scope of the Alaska Supreme Court's remand. *Pietro VI* ordered the matter on remand would be decided on the existing record, and directed the parties to appear for oral argument with briefs and appropriate attachments to support their positions from the existing record (*Pietro VI* at 9).

Pietro v. Unocal Corp., AWCB Decision No. 11-0044 (April 15, 2011) (*Pietro VII*), addressed only compensability of Employee's peripheral neuropathy, basal cell carcinoma and melanoma. *Pietro VII* held Employee's peripheral neuropathy, basal cell carcinoma and melanoma all arose out of and in the course of his employment with Employer and were compensable (*Pietro VII* at 57).

Employer appealed *Pietro VI* and *VII* to the Alaska Workers' Compensation Appeals Commission (commission). While the appeal was pending, *Pietro v. Unocal Corp.*, AWCB Decision No. 11-0132 (August 25, 2011) (*Pietro VIII*), held the panel had no jurisdiction to hear and decide Employee's claim because the case was on appeal (*Pietro VIII* at 6).

The commission reversed and remanded *Pietro VI* stating it erred by not allowing Employer to call witnesses and present additional evidence on remand from the Alaska Supreme Court. *Unocal Corp. v. Pietro*, AWCAC Decision No. 170 (September 26, 2012).

Employee petitioned the Alaska Supreme Court to review the commission's September 2012 decision. The court accepted review and summarily reversed the commission's decision and remanded so the commission could consider any remaining issues appealed from *Pietro VI* and *VII* (Order, Petition for Review, November 27, 2012).

Unocal v. Pietro, AWCAC Decision No. 178 (March 19, 2013) found substantial evidence supported *Pietro VII* and the commission affirmed (*id.* at 17).

Pietro VII having established compensability of Employee's peripheral neuropathy, basal cell carcinoma and melanoma, *Pietro v. Unocal Corporation*, AWCB Decision No. 13-0156 (December 3, 2013) (*Pietro IX*), decided Employee's claims for specific benefits on their merits.

FINDINGS OF FACT

The following facts and factual conclusions are incorporated from *Pietro IX* or otherwise established by a preponderance of the evidence:

- 1) *Pietro IX* found Employee's counsel documented litigation costs totaling \$26,549.16 for work done from April 16, 2003 through August 24, 2011, and \$184.89 since August 30, 2011. Employer did not object to these costs (Affidavit of Attorney's Fees and Costs for Services Before the Alaska Workers' Compensation Board Incurred Through August 25, 2011 Interlocutory Decision and Order, July 15, 2013; Affidavit of Attorney's Fees and Costs for Services before the Alaska Workers' Compensation Board Incurred since August 25, 2011 Interlocutory Decision and Order, September 19, 2013; *Pietro IX* at 30).
- 2) *Pietro IX* found Employee's counsel documented 260.36 hours attorney time and 186.50 hours paralegal time for services rendered from April 16, 2003 through August 24, 2011. He documented 21.30 hours attorney time and 20.80 hours paralegal time for services rendered from August 30, 2011 through the hearing and requested 3.5 hours attorney time for services at the hearing. Employer did not object to the hours requested, but objected to the lack of affidavits from the paralegals (*id.*; Employer's hearing argument).
- 3) *Pietro IX* found Employee provided no cost affidavits for his past or current paralegals and did not request that the record be left open to receive post-hearing affidavits (*Pietro IX* at 31).
- 4) *Pietro IX* found Employee through counsel suggested the cost regulation is "new" and does not apply retroactively to his paralegals' costs and said he could not obtain affidavits from some of his past paralegals because they no longer work for him. Furthermore, he argued the cost regulation has never been applied to Employee's counsel before and his counsel recently obtained a cost award for his paralegal without having the paralegal file an affidavit (Employee's hearing arguments; *Pietro IX* at 31).
- 5) On December 3, 2013, *Pietro IX* was issued. *Pietro IX* ruled on attorney's and paralegal fees and other costs, in relevant part, as follows:

6) Employee's request for attorney's fees and costs is granted in part and denied in part. Employee's request for a retroactive hourly rate increase is denied. Employer is ordered to pay Employee's counsel costs totaling \$26,549.16. Employee's request for paralegal costs is denied. Employer is ordered to pay Employee 285.16 hours attorney's fees in accordance with this decision.

7) Alternately, if the parties determine statutory minimum fees on all benefits awarded and paid as a result of *Pietro VII* or this decision exceed the actual fees requested, Employer is ordered to pay Employee's counsel statutory minimum fees on all benefits paid and awarded and on all continuing benefits.

8) Jurisdiction is reserved over the attorney's fee issue to resolve any disputes.

6) On December 11, 2013, Employee filed a timely petition requesting reconsideration of a *Pietro IX* legal ruling excluding paralegal fees, modification of factual findings regarding attorney and paralegal fees, and clarification of the *Pietro IX* attorney fee award.

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;

2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

...

4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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. . . .

AS 23.30.130. Modification of awards. (a) Upon its own initiative . . . on the ground of a change in conditions . . . 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. . . .

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: “The plain import of this amendment [adding ‘mistake in a determination of fact’ as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted”(quoting *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)). An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). “The concept of ‘mistake’ requires careful interpretation. It is clear that an allegation of mistake should not be allowed to become a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt” (*id.* at 169; citing 3 Larson, *The Law of Workmen’s Compensation* §81.52, at 354.8 (1971)).

In the case of a factual mistake or a change in conditions, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). Section 130 confers continuing jurisdiction over workers’ compensation matters (*id.*) By comparison and contrast, a petition for reconsideration has a fifteen day time limit for the request and the board’s power to reconsider “expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied” (*id.* at n. 36). *See also Williams v. Safeway Stores*, 525 P.2d 1087, 1088 (Alaska 1974) (AS 23.30.130 “requires that the application for modification be made ‘before one year after the date of last payment of compensation.’”).

Nothing in AS 23.30.130(a)’s language limits the “mistakes in determination of fact” basis for review to issues relating solely to disability. “We hold that under Alaska’s . . . compensation

provisions there is no limitation as to the type of fact coming within the ambit of the statutory ‘mistake in its determination of a fact’ review criterion.

AS 23.30.135. Procedure before the board. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

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, or may be assigned to a hearing officer. . . .

AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 n. 36 (Alaska 2005).

ANALYSIS

Should Employee’s December 11, 2013 petition be granted for purposes of additional briefing and argument concerning attorney and paralegal fees awarded in *Pietro IX*?

This decision addresses a procedural matter, so current statutes apply even though Employee’s injury arose before some of the current, cited statutes, were in effect. Employee timely filed a petition requesting reconsideration, modification and clarification of orders and findings, respectively, from *Pietro IX*. AS 44.62.540; AS 23.30.130. Employer has yet to respond to Employee’s petition. The panel’s authority to reconsider expires January 2, 2014. To ensure quick, efficient, fair, and predictable delivery of attorney and paralegal fees to Employee, if he is entitled to them, at a reasonable cost to Employer, to decide Employee’s attorney and paralegal fee claims on their merits, to be impartial and fair to all parties, to afford all parties due process

and an opportunity to be heard, to provide for their arguments and evidence to be fairly considered, to make this process and procedure as summary and simple as possible, and to best ascertain the rights of the parties, Employee's petition will be granted. AS 23.30.001(1), (2), (4); AS 23.30.005(h); AS 23.30135. This procedure will toll the appeal time and allow Employer an opportunity to respond fully to Employee's December 11, 2013 petition. It will also allow the parties an opportunity to present briefing, exhibits and oral argument at a hearing at the next mutually agreeable occasion, before the same panel issuing *Pietro IX*.

As Employee is the moving party and has set forth several factual errors, he should provide a detailed explanation of the alleged errors, within the limitations of the statutes and regulations. Employer should provide any legal arguments it wants the panel to consider on reconsideration, and any evidence to consider on modification and clarification, within the limitations of the statutes and regulations. The parties will be directed to a prehearing conference at which they will schedule a hearing limited to oral argument, 20 minutes per side. Following oral argument, the panel will decide Employee's December 11, 2013 petition on its merits.

CONCLUSIONS OF LAW

Employee's December 11, 2013 petition will be granted for purposes of additional briefing and argument concerning attorney and paralegal fees awarded in *Pietro IX*.

ORDER

- 1) Employee's December 11, 2013 petition is granted for purposes of additional briefing and argument concerning attorney and paralegal fees awarded in *Pietro IX*.
- 2) The parties are directed to attend a prehearing conference to obtain a date for additional oral argument, 20 minutes per side, limited to Employee's December 11, 2013 petition, to be held before the panel members that issued *Pietro IX*, whose names appear below.
- 3) The parties may file any additional briefing or exhibits pursuant to the regulations, or with different filing deadlines to which the parties may otherwise agree.
- 4) Jurisdiction is reserved over Employee's December 11, 2013 petition, pending oral argument and further written decision on its merits.

Dated in Anchorage, Alaska on December 20, 2013.

ALASKA WORKERS' COMPENSATION BOARD

William Soule, Designated Chair

Patricia Vollendorf, Member

Dave Kester, Member

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.

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order on Reconsideration and Modification in the matter of PAUL D. PIETRO Employee / applicant v. UNOCAL CORPORATION, Employer; UNION OIL CA. / UNOCAL, insurer / defendants; Case No. 199530232; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, on December 20, 2013.

Anna Sebeldia, Clerk