

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

ELLIOT G. DANIELS, )  
Employee, ) INTERLOCUTORY  
Claimant, ) DECISION AND ORDER  
v. )  
AWCB Case No. 201215673  
SUMMIT LIFT CO. INC., )  
Employer, ) AWCB Decision No. 13-0141  
and ) Filed with AWCB Anchorage, Alaska  
on October 30, 2013  
ALASKA WORKERS' COMPENSATION )  
BENEFITS GUARANTY FUND, )  
Defendants. )  
\_\_\_\_\_ )

The board's motion to continue the hearing on Elliot Daniels' (Employee) November 26, 2012 claim was considered by a two-member panel on October 29, 2013 in Anchorage, Alaska. The hearing date was selected on August 13, 2013. When no parties or witnesses appeared, the panel moved to continue the hearing. The record closed at the hearing's conclusion on October 29, 2013.

## ISSUE

When no one appeared for the scheduled hearing, the panel issued an oral order continuing the hearing. As the parties did not appear, their positions are unknown. This decision examines and memorializes the oral order continuing the hearing.

*Was the oral order continuing the hearing correct?*

FINDINGS OF FACT

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

1. On October 21, 2012, Employee completed a report of injury stating he had injured his abdomen on August 18, 2013 while working for Summit Lift Co. (Employer). The report identifies Liberty Mutual Insurance Co. (Liberty Mutual) as Employer's workers' compensation insurer. (Report of Injury, October 21, 2012).
2. On October 24, 2012, Employer filed a report of injury for the August 18, 2012 incident. Employer's report identifies the injury as an abdominal hernia and identifies Randy Gliege, president, as Employer's authorized representative. The report also identifies Liberty Mutual as Employer's insurer. (Report of Injury, October 24, 2012).
3. On November 20, 2012, Liberty Mutual filed a controversion denying all benefits and stating Employer's coverage had lapsed between August 10, 2012 and September 15, 2012. (Controversion Notice, November 15, 2012).
4. On November 26, 2012, Employee filed a claim seeking temporary total disability, medical and transportation costs, compensation rate review, and attorney fees if needed. The claim stated Employer was uninsured at the time of the injury, and it was served on both Employer and the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). (Claim, November 26, 2012).
5. On February 5, 2013, Employee filed a petition seeking to join the Fund. (Petition, February 5, 2013).
6. A prehearing conference was held on February 27, 2013, attended by Mr. Gliege and by Velma Thomas, Fund administrator. Employee did not attend. The prehearing conference summary states: "Parties attended to verify that the Alaska Workers' Compensation Benefit Guarantee (sic) Fund (AWCBGF) has agreed to pay benefits in this case and a hearing on the issue of compensability will not be necessary." (Prehearing Conference Summary, February 27, 2013). No one asked that the February 27, 2013 prehearing conference summary be modified or amended. (Record).
7. Another prehearing conference was held on August 13, 2013, again attended by Mr. Gliege and Ms. Thomas. Employee did not attend. The prehearing conference summary states the parties stipulated to a hearing on October 29, 2013, and that the only issue to be addressed at

the hearing was “The compensability of [Employee’s] 8/18/2012 injury.” (Prehearing Conference Summary, August 13, 2013). No one asked that the August 13, 2013 prehearing conference summary be modified or amended. (Record).

8. On October 3, 2013, the Fund filed a hearing brief requesting a determination of the amount of benefits due Employee and a determination that Employer and Mr. Gliedge personally were liable for Employee’s benefits, as well as a determination on the compensability of Employee’s claim. (Fund’s hearing brief, October 4, 2013).
9. On October 12, 2013, Employee wrote to the board stating he would be out of the country at the time of the October 29, 2013 hearing. (Letter, October 12, 2013).
10. On October 24, 2013, the Fund administrator emailed the board stating Employee had contacted her and the Fund did not oppose a continuance. (Email, October 24, 2013).
11. On October 29, 2013, prior to the hearing, the designated chair was informed Ms. Thomas was out of state because of a family emergency. (Workers’ Compensation Leave Calendar; Notice from Chief of Adjudications).

#### 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

**AS 23.30.075. Employer's liability to pay.**

.....

(b) If an employer fails to insure and keep insured employees subject to this chapter or fails to obtain a certificate of self-insurance from the division, upon conviction, the court shall impose a fine of \$10,000 and may impose a sentence of imprisonment for not more than one year. If an employer is a corporation, all persons who, at the time of the injury or death, had authority to insure the corporation or apply for a certificate of self-insurance, and the person actively in charge of the business of the corporation shall be subject to the penalties prescribed in this subsection and shall be personally, jointly, and severally liable together with the corporation for the payment of all compensation or other

benefits for which the corporation is liable under this chapter if the corporation at that time is not insured or qualified as a self-insurer.

**AS 23.30.082. Workers' compensation benefits guaranty fund.**

(a) The workers' compensation benefits guaranty fund is established in the general fund to carry out the purposes of this section. The fund is composed of civil penalty payments made by employers under AS 23.30.080, income earned on investment of the money in the fund, money deposited in the fund by the department, and appropriations to the fund, if any. However, money appropriated to the fund does not lapse. Amounts in the fund may be appropriated for claims against the fund, for expenses directly related to fund operations and claims, and for legal expenses.

....

(c) Subject to the provisions of this section, an employee employed by an employer who fails to meet the requirements of AS 23.30.075 and who fails to pay compensation and benefits due to the employee under this chapter may file a claim for payment by the fund. In order to be eligible for payment, the claim form must be filed within the same time, and in the same manner, as a workers' compensation claim. The fund may assert the same defenses as an insured employer under this chapter.

(d) If the fund pays benefits to an employee under this section, the fund shall be subrogated to all of the rights of the employee to the amount paid, and the employee shall assign all right, title, and interest in that portion of the employee's workers' compensation claim and any recovery under AS 23.30.015 to the fund. Money collected by the division on the claim or recovery shall be deposited in the fund.

**8 AAC 45.070. Hearings**

(a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

....

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing.

....

(j) If the hearing is not completed on the scheduled hearing date and the board determines that good cause exists to continue the hearing for further evidence,

legal memoranda, or oral arguments, the board will set a date for the completion of the hearing.

**8 AAC 45.074. Continuances and cancellations**

- (a) A party may request the continuance or cancellation of a hearing by filing a
  - (1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness
    - (A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and
    - (B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;
  - (2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.
- (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
  - (1) good cause exists only when
    - (A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
    - (B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
    - (C) a party, a representative of a party, or a material witness becomes ill or dies;
    - (D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
    - ....
    - (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
    - ....

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

#### ANALYSIS

*Was the oral order continuing the hearing correct?*

As Employee's October 12, 2013 letter stating he would be unavailable for the hearing is not in the form of an affidavit and there is no evidence it was served on Employer as required by 8 AAC 45.074(a), it will not be considered a petition for continuance. It is, however, evidence that Employee is unexpectedly absent from the hearing venue and cannot participate telephonically. In addition, if the compensability of his injury is at issue, Employee would be a material witness. Employee's absence is good cause to continue the hearing under 8 AAC 45.074(b)(1)(D) and (K).

Similarly, Ms. Thomas is a representative of a party who is suddenly and unexpectedly absent from the hearing venue and unable to participate telephonically. Her absence is good cause to continue the hearing under 8 AAC 45.074(b)(1)(D).

Finally, due to the conflicting statements in the February 27 and August 13, 2013 prehearing conference summaries, it is unclear whether compensability remains an issue. Due process mandates that all parties have notice of the matters to be decided at the hearing and an opportunity to respond. It is unclear whether the other parties were aware the Fund was seeking a determination on issues other than compensability. Additional arguments will be necessary to

address the issues raised in the Fund's brief. A continuance was also appropriate under 8 AAC 45.07(b)(1)(L).

CONCLUSION OF LAW

The oral order continuing the hearing was correct.

ORDER

1. The October 29, 2013 hearing is continued.
2. The parties shall schedule a prehearing to clarify the issues for hearing and select a new hearing date.

Dated in Anchorage, Alaska on October 30, 2013.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P. Ringel, Designated Chair

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Mark Talbert, 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 in the matter of ELLIOT G DANIELS, employee; v. SUMMIT LIFT CO. INC., employer, and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 201215673; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on October 30, 2013.

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Pamela Murray, Office Assistant