

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

VIRGIL A. ADAMS,)	
)	
Claimant,)	
v.)	INTERLOCUTORY
)	DECISION AND ORDER
O&M ENTERPRISES and)	
THE MICHAEL A. HEATH TRUST,)	AWCB Case No. 201113128
)	
and)	AWCB Decision No. 14-0109
)	
ALASKA WORKERS' COMPENSATION)	Filed with AWCB Anchorage, Alaska
BENEFITS GUARANTY FUND, and)	On August 8, 2014
WILTON ADJUSTMENT SERVICE, INC.,)	
)	
Defendants.)	
)	

The Michael A. Heath Trust's (the Trust) November 8, 2013 petition to quash a notice of records deposition and subpoena duces tecum and for a protective order was heard in Anchorage, Alaska on August 6, 2014, a date selected on July 16, 2014. Virgil Adams (Claimant) appeared with his attorney, Charles Coe. Attorney Steven Smith appeared for Michael Heath (Mr. Heath), whom Claimant alleges to have been his employer at the time of injury. Velma Thomas appeared telephonically for the Workers' Compensation Benefits Guaranty Fund (the Fund). Assistant Attorney General Thomas Dosik appeared for the Fund and its adjusters, Wilton Adjustment Service, Inc. (Wilton). The Trust did not appear. There were no witnesses. When the Trust did not appear, an oral order issued continuing the hearing. The record closed at the hearing's conclusion on August 6, 2014. This decision examines the oral order continuing the August 6, 2014 hearing.

ISSUES

As a preliminary matter, the parties addressed whether the Trust received notice of the August 6, 2014 hearing, because it did not appear, and whether the hearing should proceed.

Claimant contended the hearing should proceed. Claimant contended he is waiting for discovery to be completed, and the instant petition needs to be addressed before documents could be discovered or exchanged. Claimant was prepared to proceed.

The Fund did not take a position with respect to the hearing proceeding. The Fund was prepared to proceed.

Mr. Heath's attorney contended he did not represent the Heath Trust. Mr. Heath's attorney stated he preferred to learn the Trust's position with regards to the instant petition before proceeding with the hearing.

Because the Trust had not received notice of hearing on its November 8, 2013 petition, the August 6, 2014 hearing was continued until such time as all parties receive proper notice.

Was the oral order to continue the August 6, 2014 hearing correct?

FINDINGS OF FACT

The following facts or factual conclusions are either undisputed or are established by a preponderance of the evidence:

- 1) On September 20, 2011, Claimant filed a claim, naming his employer at the time of the workplace injury as "Michael Heath O&M Enterprises." The claim stated Mr. Heath was uninsured at the time of the injury, and sought to join the Fund as a party. (Workers' Compensation Claim, September 20, 2011).
- 2) On October 9, 2013, Claimant filed and served a subpoena duces tecum and also a notice of records deposition, both directed and addressed to the Trust. The subpoena requested "...any and all legal documents, trust documents, tax returns, financial reports, notes, research, and statements used in the preparation of the Michael A. Heath trust." The notice of records deposition did not state its subject matter. (Subpoena and Notice, October 9, 2013).

- 3) On August 15, 2013, Claimant filed a petition to join the Michael A. Heath Trust as a party. The petition was served upon the Michael A. Heath Trust at Mr. Heath's address. (Petition, August 15, 2013).
- 4) No objection was filed to Claimant's petition. (Record).
- 5) On November 8, 2013, the Trust, through the law firm of Davis & Mathis, P.C., filed a petition and brief to quash the notice of records deposition and subpoena duces tecum and for a protective order. (Petition, November 8, 2013).
- 6) The Trust's brief makes various arguments supporting its position it should not be required to disclose the requested documents. The brief states, in relevant part:

The firm does not represent O&M Enterprises, Michael Heath, or any other party to this workers' compensation proceeding. . . . In 2006 the firm was retained by Michael Heath for estate planning work. . . . The subpoena and the notice seek the production of information and documents which appear to fall within the definitions of client confidences and secrets. . . . Moreover, Mr. Heath has instructed the firm not to provide the documents and information. Since the subpoena and notice seek the production of documents that appear to either be secrets or confidences and Mr. Heath has not consented to their disclosure or production, the firm is required, by Professional Conduct Rule 1.6(a) to not produce the documents. . . . (Brief, November 8, 2013).

- 7) On July 16, 2014, the parties attended a prehearing conference. The Trust did not receive notice of the prehearing and it did not attend. The designee set a hearing for August 6, 2014, with the sole issue identified as the Trust's November 8, 2013 petition to quash and for protective order. (Prehearing Conference Summary, July 16, 2014).
- 8) On July 17, 2014, a hearing notice was sent notifying parties of the August 6, 2014 hearing, but the Trust was not served with the hearing notice. (Hearing Notice, July 17, 2014).
- 9) The Trust's attorney has not filed an entry of appearance. (Record).
- 10) Assistant Attorney General Thomas Dosik, who took the place of retired Assistant Attorney General Toby Steinberger, has also not filed an entry of appearance. (*Id.*).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

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. . . .

(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. .

. .

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. . . .

8 AAC 45.074. Continuances and cancellations.

...

(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

...

(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

8 AAC 45.178. Appearances and withdrawals. (a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with the board, and shall serve a copy of the notice upon all parties. The notice of appearance must include the representative's name, address, and phone number and must specify whether the representative is an attorney licensed to practice law within the State of Alaska. . . .

(b) A representative of a party may withdraw an appearance by filing with the board a written notice of withdrawal and by serving the notice upon all parties. The withdrawal becomes effective upon receipt by the board.

ANALYSIS

Was the oral order to continue the August 6, 2014 hearing correct?

Claimant's "employee" status and his "employer" are disputed. As Claimant may have a right to relief against the Trust, Claimant petitioned to join the Trust as a party. 8 AAC 45.040(d). Because no objection was timely filed to Claimant's August 15, 2013 petition to join, the Trust was joined as a party by operation of law. 8 AAC 45.040(g), (h)(1)-(2). The Trust's representative will be directed to file an entry of appearance, and the Trust will be advised to appear at subsequent prehearings and hearings, so it may protect whatever legal interest it may have with respect to Claimant's workers' compensation claim. Attorney Dosik will also be directed to enter his appearance. 8 AAC 45.178(a).

Hearings are held at the time and place fixed by proper notice to all parties. 8 AAC 45.070(a). Continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). However, the Trust did not receive notice of and did not attend the July 16, 2014 prehearing conference which set the August 6, 2014 hearing date. Further, the Trust did not receive notice of the August 6, 2014 hearing. The Trust had no knowledge – constructive or actual – that a hearing on its November 8, 2013 petition had been set. Due process and fundamental fairness require the Trust receive notice of a hearing potentially affecting its rights and duties. AS 23.30.001(1). The Trust has a right for its evidence and arguments to be seen and heard. Without the Trust's participation, its rights may be irreparably harmed because its petition may be denied leaving it no recourse but to file a costly appeal. The Trust could never recapture this expense. Therefore, good cause existed and the oral order to continue the August 6, 2014 hearing was correct. 8 AAC 45.070(L), (N).

A prehearing is currently scheduled for September 3, 2014, at 1:30 P.M. The designee will be directed to issue notice of the prehearing to all parties, including the Trust. The designee will thereafter be directed to issue notice to all parties of any subsequent hearings as they are scheduled.

CONCLUSIONS OF LAW

The oral order to continue the August 6, 2014 hearing was correct.

ORDER

- 1) The designee is directed to issue notice of the September 3, 2014 prehearing to all parties, including the Trust's attorneys, Davis & Mathis, P.C., at the address listed on its November 8, 2013 petition.
- 2) The Trust's representative is directed to file an appearance in the event it intends to represent the Trust in this case.
- 3) Attorney Dosik is also directed to file an appearance.

Dated in Anchorage, Alaska on August 8, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Rick Traini, 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 VIRGIL A. ADAMS, claimant v. O&M ENTERPRISES and THE MICHAEL A. HEATH TRUST; ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND, defendants; Case No. 201113128; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on August 8, 2014.

Pamela Hardy, Office Assistant