

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CLIFTON E. SMITH,)	INTERLOCUTORY
Employee,)	DECISION AND ORDER
)	
)	AWCB Case No. 201324074
v.)	AWCB Decision No. 14- 0116
SWAN EMPLOYER SERVICES,)	
Employer,)	Filed with AWCB Fairbanks, Alaska
and)	on August 15, 2014
)	
LIBERTY MUTUAL,)	
Insurer.)	
)	

Clifton Smith's (Employee) petition to continue the July 17, 2014 hearing on Swan Employer Services and Liberty Mutual's (Employer) May 15, 2014 Petition for Review of the Reemployment Benefits Administrator's (RBA) May 5, 2014 Determination of Eligibility for Reemployment Benefits was heard as a preliminary matter on July 17, 2014. Employee appeared telephonically, represented himself and testified. Attorney Adam Sadoski of Holmes Weddle & Barcott, PC appeared and represented Employer. The parties presented witness testimony and argument on Employee's request for continuance, the panel deliberated, and a majority of the panel orally granted Employee's request for continuance. This decision memorializes that order. The record closed at the conclusion of the hearing, on July 17, 2014.

ISSUES

Employee contended he was unprepared to proceed with the hearing as scheduled as he believed attorney John Franich was representing him and would appear at the hearing on his behalf.

Employee orally requested a continuance of the hearing to allow him to secure legal representation. Employer contended no attorney-client relationship was established, no entry of appearance was filed, and Employee was aware of the hearing date several weeks in advance. Employer contended no good cause existed to warrant a continuance and the hearing should proceed.

Was the oral order granting Employee's request for continuance of the July 17, 2014 hearing correct?

FINDINGS OF FACT

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

- 1) On October 30, 2013, Employee injured his knee while working as a warehouse worker for Employer. (Report of Occupational Injury or Illness, November 5, 2013).
- 2) On May 5, 2014, the RBA designee notified the parties Employee was eligible for reemployment benefits. (Determination of Eligibility for Reemployment Benefits, May 5, 2014).
- 3) On May 15, 2014, Employer filed a Petition for Review of the RBA's May 5, 2014 Determination of Eligibility for Reemployment Benefits. (Petition, May 15, 2014).
- 4) On June 9, 2014, the parties attended a prehearing conference and agreed to set Employer's petition for hearing on July 17, 2014. (PHC Summary, June 9, 2014).
- 5) Employee credibly testified about his contact with the Franich Law Office in the weeks prior to the July 17, 2014 hearing. He kept detailed notes of his conversations with John Franich's paralegal Heidi Wilson. He first called the office and spoke to the receptionist on June 18, 2014, who directed him to fax his paperwork to the office before he could speak to Ms. Wilson for an intake appointment. Employee attempted to fax his paperwork to the office on June 18, 2014, but the law office fax machine was broken. The fax was successfully delivered the following morning, June 19th. Employee testified Ms. Wilson specifically told him either she or John Franich would appear at the July 17, 2014 hearing on his behalf. He testified he called Ms. Wilson at her direction on Friday July 11, 2014 at 12:00 pm Alaska time, and she told him if she needed any additional information she would call him. He knows the phone call occurred at that time because there is a three-hour time difference between Arkansas and Alaska and he set an alarm on his phone to call her at that time. He testified he never received a voicemail message from Ms. Wilson or anyone at Franich Law Office indicating they would not be able to represent him. Employee agreed he did not receive a formal contract for services or fee agreement from

Franich Law Office. Employee believed either Ms. Wilson or Mr. Franich would appear and represent him at the July 17, 2014 hearing on Employer's petition. When asked about the discrepancies between his and Ms. Wilson's testimony, he stated, "there seems to be some unprofessionalism transpiring. I don't know how attorneys work, but usually leaving a message on the Monday before the Thursday doesn't leave you very much time to make different plans, and since our first contact was on 6/18 with a fax ... that would have given me ample time to contact someone else instead of four days before the hearing and 4,000 miles away." (Employee).

6) Heidi Wilson, a paralegal with John Franich's office, credibly testified about her conversations with Employee. Unfortunately, their memories differ. Ms. Wilson testified Employee first contacted Franich Law Office on June 30, 2014 and spoke with the receptionist, Leah Ratchford. Ms. Wilson then spoke with Employee on July 2, 2014. She testified she spoke to Employee about the specifics of his case and indicated she would review his paperwork and contact him again. She then called him "later, I would say the middle of last week" and informed him that she would speak to Mr. Franich and let Employee know if he would represent him. She testified she then spoke to Mr. Franich, who informed her he had a hearing in Juneau the day before Employee's hearing, and given the short time frame, he would not be able to represent Employee. She testified she left a voicemail message for Employee on Monday, July 14, 2014 informing him Mr. Franich could not represent him. She testified neither she nor anyone at her office ever told Employee Mr. Franich would represent him or would file an entry of appearance in his case. The standard office practice when securing a client who lives outside Fairbanks is to send a fee agreement and contract for services to the prospective client's signature. She did not send a fee agreement or contract for services to Employee. On cross-examination, when Employee indicated he had a fax coversheet confirmation directed to Heidi dated June 18, 2014, Heidi testified the first note in their system was June 30th and she had no recollection of the specifics of the office's contacts with Employee. When asked if she had told Employee that either she or Mr. Franich would be at the hearing on July 17, 2014, Heidi testified, "No, I did not say that." She testified she did not speak to Employee on July 11, 2014, nor did she tell him if she needed any additional information she would call him. (Wilson).

7) Leah Ratchford, a receptionist at John Franich's office, testified she first spoke to Employee on June 18, 2014 and directed him to fax his file to the office before he spoke with

Ms. Wilson. She confirmed the office received Employee's 41-page fax at 8:45 am June 19th. (Ratchford).

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.

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The board may base its decision not only on direct testimony 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, 533-534 (Alaska 1987).

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

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(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;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(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;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(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.

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

(1) the affidavit of readiness is inoperative for purposes of scheduling another hearing;

(2) the board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and

(3) a party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

ANALYSIS

Was the oral order granting Employee's request for continuance of the July 17, 2014 hearing correct?

Continuances are disfavored and will not be routinely granted. A hearing may be continued only for good cause. Good cause exists where, despite a party's due diligence, irreparable harm may result from failure to grant the requested continuance. 8 AAC 45.074(b)(1)(M).

Employee contended he was unprepared to proceed with the hearing as scheduled as he believed John Franich was representing him and would appear at the hearing on his behalf. There are factual disputes in the witness testimony on this issue. While the panel does not disbelieve any witness' recollection of the parties' several conversations, the preponderance of the evidence demonstrates Employee and Franich Law Office did not enter into an attorney-client relationship. However, Employee was diligent in contacting Franich Law Office well in advance of the July 17, 2014 hearing and, based on his credible testimony, it is reasonable to assume he understood John Franich was representing him and either he or Heidi Wilson would appear at the hearing.

Employee's right to reemployment benefits, including a reemployment plan and stipend, is at issue here. To proceed with the hearing when Employee has not prepared and while he is in the process of obtaining counsel could result in irreparable harm to Employee. Therefore, a continuance is proper. A prehearing will be scheduled to select a new hearing date for Employer's petition.

CONCLUSION OF LAW

The oral order granting Employee's request for continuance of the July 17, 2014 hearing was correct. A prehearing will be scheduled to reschedule the hearing.

ORDER

- 1) Employee's oral request to continue the July 17, 2014 hearing is GRANTED.
- 2) The July 17, 2014 hearing is continued.
- 3) A prehearing conference is set for September 15, 2014 at 10:00 am, to reschedule a hearing on Employer's May 15, 2014 Petition for Review of the RBA's May 5, 2014 Determination of Eligibility for Reemployment Benefits.

Dated in Fairbanks, Alaska on August 15, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Amanda K. Eklund, Designated Chair

/s/ _____
Rick Traini, Member

DISSENT BY MEMBER DUQUETTE

The industry member respectfully dissents from the majority's decision. Based on the credible testimony of Heidi Wilson and Leah Ratchford, it is clear no attorney-client relationship was established between Employee and Franich Law Office. Employee's testimony that Heidi Wilson told him either she or John Franich would appear at the July 17, 2014 hearing is not credible. It was not reasonable for Employee to assume Franich Law Office would represent him. Employee should have prepared to represent himself at the hearing. Employee's request for continuance should be denied.

/s/ _____
Julie Duquette, 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

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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 in the matter of CLIFTON SMITH, Employee v. SWAN EMPLOYER SERVICES and LIBERTY MUTUAL, Employer/insurer; Case No. 201324074; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, on August 15, 2014.

/s/ _____
Darren Lawson
Office Assistant II