

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

RAYMUNDO ZENDEJAS,)	
Employee,)	
Decedent,)	INTERLOCUTORY
)	DECISION AND ORDER
SUSANNA ZENDEJAS,)	
Claimant,)	AWCB Case No. 201604195
)	
v.)	AWCB Decision No. 17-0016
)	
MICHAEL JOHNSON d/b/a)	Filed with AWCB Anchorage, Alaska
HAMMERDOWN CONSTRUCTION,)	on February 2, 2017
Employer,)	
)	
and)	
)	
BENEFIT GUARANTY FUND,)	
Insurer,)	
Defendants.)	

The Alaska Workers' Compensation Benefit Guaranty Fund's (Fund) July 13, 2016 petition to join was heard on January 5, 2017, in Anchorage, Alaska. The hearing date was selected on September 6, 2016. Assistant Attorney General Siobhan McIntyre appeared and represented the Fund. Joanne Pride appeared telephonically and represented Wilton Adjustment (Wilton). Velma Thomas appeared telephonically as administrator of the Fund. Attorney Michael Flanigan appeared and represented Susanna Zendejas, widow of Raymundo Zendejas. (Mrs. Zendejas, Mr. Zendejas, respectively). Attorney Robert Stone appeared and represented the estate of Michael Johnson (Estate). There were no witnesses. The record closed at the conclusion of the hearing on January 5, 2017.

ISSUE

The Fund contends at the time of Mr. Zendejas's death, Employer operated as a sole proprietorship, which was not a separate legal entity from the individual Michael Johnson. The Fund contends the estate of Michael Johnson is a party to this action by operation of law because Mrs. Zendejas' cause of action against Michael Johnson doing business as Hammerdown Construction survives against the personal representative and the Estate. Alternatively, the Fund contends the Estate should be joined because it is a party against whom a right to relief may exist under the Act. The Fund's July 13, 2016 petition seeks to join the estate of Michael Johnson as a party to Mrs. Zendejas' claim.

The Estate objects to joinder and contends this decision lacks jurisdiction to join it as a party. The Estate contends the probate court, rather than the Board, has jurisdiction on all subject matter relating to estates. The Estate contends any compensation order which might issue in this case would be unenforceable as against the Estate due to lack of jurisdiction.

Mrs. Zendejas contends the Board has concurrent jurisdiction with the probate court and may join the Estate. Mrs. Zendejas contends Michael Johnson was the sole proprietor of the employer, which the law treats as an alter-ego of the owner, making the Estate liable for any compensation ordered in connection with Mr. Zendejas' death. Mrs. Zendejas seeks an order joining the Estate.

Should the estate of Michael Johnson be joined as a party to Mrs. Zendejas' claim?

FINDINGS OF FACT

The following is established by a preponderance of the evidence:

1) On February 16, 2016, Mrs. Zendejas filed a claim against "Michael P. Johnson d/b/a Hammerdown Construction" for unspecified benefits on behalf of herself and two minor children. The claim lists a date of injury of March 10, 2015, and states:

[Employee] attempted to rescue coworker in a 8' well where workers were using dry ice to increase well production. As the dry ice dissipated . . . air was displaced and [Employee] and his coworker suffocated and ultimately passed away as a

result of the incident. The other worker who was killed in the incident was the ER, Michael Paul Johnson. (Workers' Compensation Claim, February 16, 2016).

- 2) On May 26, 2016, the Fund sent a letter the Law Office of Robert Stone, LLC. The letter requested discovery responses concerning the estate of Michael Johnson. (Letter, May 26, 2016).
- 3) On July 11, 2016, attorney Stone responded to the Fund's May 26, 2016 letter, stating the scope of his representation does not include defending the instant workers' compensation claim, and he is not authorized to respond to the Fund's discovery request. (Letter, July 11, 2016).
- 4) On July 13, 2016, the Fund filed a petition to join. The petition states:

Petition to amend caption to reflect party in interest, Estate of Michael P. Johnson. Michael Johnson d/b/a Hammerdown Construction is a sole proprietorship and therefore not a separate legal entity from Michael P. Johnson. Michael P. Johnson is deceased; the estate is the proper party in interest in this matter and joinder is necessary to correct the caption. In the alternative, the Fund petitions to join the Estate of Michael P. Johnson. (Petition, July 13, 2016).

- 5) On July 20, 2016, the Estate, by attorney Stone, filed an opposition to the Fund's July 13, 2016 petition. The opposition states the Estate opposes joinder, and does not consent to participation in any proceedings under the Act related to the death of Mr. Zendejas. The opposition states Mr. Zendejas' employer was Hammerdown Construction, and the Estate should not be made a party. (Opposition, July 20, 2016).
- 6) On September 1, 2016, Wilton controverted all benefits. The controversion notice states, according to witness statements, Mr. Zendejas was not working for the alleged employer at the time of the March 10, 2015 incident. The notice states on the date of the incident, Mr. Zendejas was "hanging out" at the home of Michael Johnson, while Johnson was doing some personal, residential work. (Controversion Notice, September 1, 2016).
- 7) On September 6, 2016, a prehearing conference was held. The parties agreed to schedule a hearing, with the only issue listed as the Fund's July 13, 2016 petition to join. (Prehearing Conference Summary, September 6, 2016).
- 8) On September 13, 2016, the Fund filed a statement of non-objection to the joinder of Mrs. Zendejas, and as representative of the minor children. The Fund reserved the right to controvert benefits, pending additional discovery. (Non-Opposition, September 13, 2016).
- 9) On January 4, 2017, the Law Offices of Michael J. Schneider, P.C. filed a document styled "Motion to Dismiss the AS 23.30.082 Comp Guaranty Fund Claim Brought by Susanna

Rosalinda Perez Zendejas.” The motion is signed by “counsel for the deceased claimant,” and states in relevant part:

. . . Beverly Sanchez is the Personal Representative of the Estate of the deceased alleged employee, Raymundo Zendejas. As such, AS 23.30.055 vests in her the exclusive right and ability to make an election of remedies between those provided by Title 23 and those provided by Title 9 (AS 9.55.580). Because that election was made long ago, because Ms. Sanchez was then, and now remains the Personal Representative of the Zendejas estate, Susanna lacks standing to bring these proceedings and her claim must therefore be dismissed. (Motion, January 4, 2017).

The motion attaches as an exhibit the complaint for wrongful death filed with the court on April 6, 2016. The plaintiff is Mr. Zendejas’ sister, Beverly Sanchez. The estate of Michael Paul Johnson is named as defendant. (*Id.*).

10) Because it was not listed as an issue for the January 5, 2017 hearing, an oral order issued that the January 4, 2017 motion will not be addressed in this decision. (Prehearing Conference Summary, September 6, 2016; Record).

11) A screen capture from the website of the Division of Corporations shows a business license for Hammerdown Construction. The business type is a sole proprietorship. The owner is Michael Johnson. The issuance date is June 9, 2014. The expiration date is December 31, 2015. (Fund’s Hearing Exhibit A).

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. . . .

(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.

The board may base its decision on not only direct testimony, medical findings, 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, 533-34 (Alaska 1987).

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee’s need for medical treatment arose out of and in the course of the employment. . . . Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

AS 23.30.045. Employer’s liability for compensation. (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180--23.30.215.
. . . .

(b) Compensation is payable irrespective of fault as a cause for the injury. . . .

AS 23.30.075. Employer’s liability to pay. (a) An employer under this chapter, unless exempted, shall either insure and keep insured for the employer’s liability under this chapter in an insurance company or association duly authorized to transact the business of workers’ compensation insurance in this state, or shall furnish the division satisfactory proof of the employer’s financial ability to pay directly the compensation provided for. . . .

AS 23.30.080. Employer’s failure to insure. (a) If an employer fails to comply with AS 23.30.075 the employer may not escape liability for personal injury or death sustained by an employee when the injury sustained arises out of and in the usual course of the employment because

(1) the employee assumed the risks inherent to or incidental to or arising out of the employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of an employer to furnish reasonably safe tools or appliances; or because the employer exercises reasonable care in selecting reasonably competent employees in the business;

(2) the injury was caused by the negligence of a co-employee;

(3) the employee was negligent, unless it appears that the negligence was wilful and with intent to cause the injury or was the result of wilful intoxication on the part of the injured party. . . .

AS 23.30.082. Workers' compensation benefits guaranty fund.

. . . .

(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.

(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. .
. .

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 by 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. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury. . . .

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 45.120. Evidence.

....

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. . . .

To be admissible at hearing, evidence must be relevant. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), provided guidance in determining relevancy:

Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . To be admissible at hearing, evidence must be ‘relevant.’ However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing.

The scope of admissible evidence in board hearings is broader than in civil courts because AS 23.30.135 makes most civil rules inapplicable. Information inadmissible at a civil trial may be discoverable in a workers’ compensation claim if it is reasonably calculated to lead to relevant facts. *Granus* at 14.

The Alaska Supreme Court encourages “liberal and wide-ranging discovery under the Rules of Civil Procedure.” *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 at 4, n. 2 (December 11, 1987). *Granus* defined the term “relevant” in AS 23.30.107(a) as follows:

We frequently look to the Alaska Rules of Civil Procedure for guidance in interpreting our procedural statutes and regulations. Civil Rule 26(b)(1) governs the general scope of discovery in civil actions and provides in pertinent part, ‘[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action. . . . The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.’

We find the definition of ‘relevant’ for discovery purposes in Civil Rule 26(b)(1) is persuasive as to the meaning and legislative intent of the phrases ‘relative to employee’s injury’ and ‘that relate to questions in dispute’ used in AS 23.30.107(a) and AS 23.30.005(h), respectively. The Civil Rules favor liberal and wide-ranging discovery. . . . However, the scope of evidence we may admit and consider in deciding those narrow issues is broader. Information which would be inadmissible at trial, may nonetheless be discoverable if it is reasonably calculated to lead to admissible evidence. . . .

To be admissible at hearing, evidence must be ‘relevant.’ However, we find a party seeking to discover information need only show the information appears reasonably calculated to lead to the discovery of evidence admissible at hearing.

Alaska Rule of Civil Procedure 26. General Provisions Governing Discovery; Duty of Disclosure.

. . . .

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . .

At common law, sole proprietorships are not “legal entities.” In a sole proprietorship, all of the proprietor’s assets are completely at risk, and the sole proprietorship ceases to exist upon the proprietor’s death. Alaska law deems the “company” to be simply an alter ego of the proprietor, who is engaged in commerce under a *nom d’affaires* - an assumed name adopted for business purposes. A sole proprietorship has no legal significance apart from its sole proprietor. It cannot

incur debts, conduct business, sue or be sued, or incur or pay taxes apart from its sole proprietor. The accountability of a sole proprietorship is therefore no different from that of an individual. *State v. ABC Towing*, 954 P.2d 575, 578 (Alaska Ct. App. 1998) *Citing Roeckl v. Federal Deposit Insurance Corp.*, 885 P.2d 1067 (Alaska 1994).

An “estate” is defined as “all that a person or entity owns, including both real and personal property” and “the property that one leaves after death; the collective assets and liabilities of a dead person.” *Black’s Law Dictionary* 588 (8th Ed. 1999).

ANALYSIS

Should the estate of Michael Johnson be joined as a party to Mrs. Zendejas’ claim?

The Fund has produced evidence Hammerdown Construction was a sole proprietorship of Michael Johnson, now deceased. AS 23.30.135; *Rogers & Babler*. In Alaska, all of a proprietor’s assets are at risk with respect to business liability. *ABC Towing*. This includes individual liability for benefits under the Act, where an injury or death has arisen out of the course of employment for a sole proprietor. AS 23.30.010; AS 23.30.075; AS 23.30.080.

The Estate presents a hypothetical in support of its position that this decision has no authority to order joinder: A motor vehicle accident occurs in the course and scope of an employee’s employment and a third party is at fault. The Estate contends the workers’ compensation carrier would have a direct cause of action against the tortfeasor. The Estate’s hypothetical contends such a cause of action (the carrier’s recovery from the tortfeasor) is properly filed with the court, rather than with the Workers’ Compensation Board. However, the Estate’s hypothetical is distinguishable for one critical reason: here, there is no allegation of a third party’s involvement, and so no shifting liability. If the death of Mr. Zendejas is ultimately found to arise out of the course of employment for Hammerdown Construction, the Estate would be directly liable for benefits because the assets and liabilities of the sole proprietorship were vested in the Estate at the time of Michael Johnson’s death. AS 23.30.010; AS 23.30.045; AS 23.30.075; AS 23.30.080; *ABC Towing*.

The scope of admissible evidence in proceedings under the Act is broader than in civil courts. AS 20.30.135; 8 AAC 45.120; *Granus*. Information inadmissible at a civil trial may be discoverable in a workers' compensation case if it is reasonably calculated to lead to relevant facts. *Id*; Civil Rule 26(b)(1). Mrs. Zendejas and her minor children may have a right to benefits from an uninsured employer. AS 23.30.010; AS 23.30.045; AS 23.30.075; AS 23.30.080. A person who worked for an employer that was uninsured under AS 23.30.075 and that fails to pay compensation and benefits due under the Act, or his beneficiaries, may file a claim for payment against the Fund. AS 23.30.082. Because the Estate may potentially be liable for compensation related to the death of Mr. Zendejas, the Fund has an interest in obtaining relevant discovery from the Estate. *Id*. Information concerning the assets, liabilities, and administration of the Estate is relevant and therefore discoverable. AS 23.30.001; AS 23.30.135; 8 AAC 45.120; *Granus*; *Rogers & Babler*. The Estate will be joined. *Id.*; 8 AAC 45.040.

CONCLUSION OF LAW

The estate of Michael Johnson will be joined as a party to Mrs. Zendejas' claim.

ORDER

- 1) The Fund's July 13, 2016 petition to join the estate of Michael Johnson is granted.
- 2) The estate of Michael Johnson is joined as a party to Mrs. Zendejas' claim.
- 3) A representative of the estate of Michael Johnson is ordered to file an entry of appearance in this case for the purpose of notice and to receive pleadings.

Dated in Anchorage, Alaska on February 3, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Robert C. Weel, Member

/s/
Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory 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 RAYMUNDO ZENDEJAS, employee / claimant; v. MICHAEL JOHNSON d/b/a HAMMERDOWN CONSTRUCTION, employer; BENEFIT GUARANTY FUND, insurer / defendants; Case No. 201604195; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 3, 2017.

/s/
Pamela Hardy, Office Assistant