

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION )  
FOR A FINDING OF FAILURE TO ) INTERLOCUTORY DECISION  
INSURE WORKERS' COMPENSATION ) AND ORDER  
LIABILITY, AND ASSESSMENT )  
OF A CIVIL PENALTY AGAINST, ) AWCB Case No. 700004904  
)  
JOSHUA BULARD and ) AWCB Decision No. 17-0083  
MARGARET ROBINSON d/b/a )  
BULARD GENERAL CONTRACTING, ) Filed with AWCB Anchorage, Alaska  
) on July 21, 2017  
Respondents. )  
)

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The Division of Workers' Compensation, Special Investigations Unit's ("Division" and "SIU") July 22, 2016 petition and December 13, 2016 amended petition for a finding of failure to insure workers' compensation liability, and assessment of a civil penalty against Bulard General Contracting (Employer), was heard in Anchorage, Alaska on July 19, 2017. The hearing date was selected on June 6, 2017. Investigator Doug Love appeared and represented the SIU and testified. Joshua Bulard appeared telephonically on behalf of Employer. An oral order issued by the panel granting the SIU's oral petition to recuse the designated chair before the hearing was completed. The record closed at the hearing's conclusion, on July 19, 2017.

## ISSUE

After completion of opening arguments and while presenting evidence, the SIU made an oral petition to recuse the designated chair. The SIU contended it would not receive a fair hearing due, in part, to the chair's prior holding of prehearing conferences in this case. The SIU additionally contended the chair's rulings on presentation and admissibility of evidence were different than

previous, unrelated cases. The SIU contended the chair was improperly ruling on evidence where no objection had been made and the Division would therefore not receive a fair hearing.

Employer did not take a position with respect to recusal. After deliberating, an oral order issued by the remaining panel members recusing the chair in order to avoid the appearance of impropriety. When Employer understood the panel's conclusion, it contended the chair was fairly conducting the hearing.

**Was the oral order recusing the designated chair correct?**

FINDINGS OF FACT

The following facts are established by a preponderance of the evidence:

- 1) On July 22, 2016, the SIU filed a petition for a finding of failure to insure workers' compensation liability and assessment of a civil penalty against Employer. (Petition, July 22, 2016).
- 2) On August 30, 2016, the parties attended a prehearing conference. The prehearing conference summary states:

First prehearing. SIU stated investigation is underway, but parties have had no contact about the case. There appears to be some dispute over whether Employer received the Division's July 22, 2016 petition. . . . (Prehearing Conference Summary, August 30, 2016).

- 3) On August 31, 2016, the SIU filed a petition to compel discovery. The petition attached the SIU's July 22, 2016 discovery demand. (Petition, August 31, 2016).
- 4) On September 29, 2016, the parties attended a prehearing conference to discuss the SIU's August 31, 2016 petition to compel. The prehearing conference summary states:

Employer stated he had an acquaintance hand-deliver discovery documents to SIU. Investigator Love stated no documents have been received by SIU. Employer stated he will hand-deliver the documents himself. Board Designee e-mailed Employer the August 31, 2016 petition and discovery request.

After reviewing SIU's August 31, 2016 petition to compel, Board Designee grants the petition. Employer is given seven (7) days to comply with SIU's discovery requests listed in its August 31, 2016 petition. Employer is strongly cautioned that a Board finding of Employer's failure to comply may result in additional civil penalties imposed. . . . (Prehearing Conference Summary, September 29, 2016).

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5) On December 13, 2016, the SIU filed an amended petition for a finding of failure to insure workers' compensation liability naming Joshua Bulard and Margaret Robertson as partners doing business as Bulard General Contracting. (Petition, December 13, 2016).

6) On March 19, 2017, a prehearing conference was held. Employer did not appear. The prehearing conference summary states:

Board Designee called Employer at the number of record, and also 907-XXX-8899, and left a message at the latter number. After waiting a few minutes, the prehearing proceeded in Employer's absence. SIU requests hearing on the written record on its July 22, 2016 petitions and also the amended December 13, 2016 petition.

A hearing was scheduled on the basis of the written record for April 12, 2017. (Prehearing Conference Summary, March 19, 2017).

7) On April 3, 2017, the SIU filed a hearing brief for the April 12, 2017 written record hearing. (Brief, April 3, 2017).

8) On April 25, 2017, the Board panel sent the parties a letter:

On March 9, 2017, this case was set for hearing on the written record on April 12, 2017. The issues for hearing are the Special Investigation Unit's (SIU) July 22, 2016 and December 13, 2016 petitions for a finding of failure to insure workers' compensation liability against Bulard General Contracting, the alleged employer.

The Alaska Workers' Compensation Board, on its motion, re-opens the hearing record for submission of legal memoranda for the reasons below. 8 AAC 45.120(m).

Legal memoranda must not exceed 15 pages, excluding exhibits, unless at a prehearing the Board or its designee determine unusual and extenuating circumstances exist. In such a case, a party may be granted permission to file a brief in excess of 15 pages, which must be accompanied by a one-page summary of the issues and arguments. 8 AAC 45.114.

The SIU's April 3, 2017 hearing brief is 32 pages in length. Significant portions of the SIU's April 3, 2017 brief contain possibly inadmissible hearsay, which may not be used to support a finding of fact. Irrelevant and unduly repetitious evidence may also be excluded.

Since it is not represented by an attorney, the SIU will be granted 30 days from the date of this letter order to file and serve an amended hearing brief. The SIU is urged to review 8 AAC 45.120(e) pertaining to hearing evidence, relevance, and admissibility. The record will close in this case on May 24, 2017.

Because the alleged employer in this case did not file a brief or evidence prior to closure of the April 12, 2017 record, legal memoranda or evidence will not be accepted from the alleged employer. . . . (Letter, April 25, 2017).

9) On May 22, 2017, the SIU filed a petition for a prehearing conference. The petition states, “The Division is seeking a prehearing conference to discuss its motion to consider amended exhibit #50 and to schedule an oral hearing so the Board can ask questions about the Division’s witness interviews, evidence, and civil penalty calculations.” (Petition, May 22, 2017).

10) On June 6, 2017, the SIU attended a prehearing conference. The prehearing conference summary states:

Board Designee telephoned Employer at last number of record, and left a message. After waiting a few minutes, the prehearing proceeded in Employer’s absence.

Designee and Investigator Love discussed SIU’s May 22, 2017 petition to consider amended exhibits, in light of fact that record was re-opened by the Board’s letter of April 25, 2017.

An oral hearing is set on the merits of SIU’s July 22, 2016 petition for a finding of failure to insure workers’ compensation liability and also the amended December 13, 2016 petition. Board Designee notes the hearing record is being re-opened, and so any party may file briefs and/or evidence in advance of this hearing . . . .

An oral hearing was set for July 19, 2017 on the SIU’s July 22, 2016 petition for a finding of failure to insure workers’ compensation liability and also the amended December 13, 2016 petition. Employer, or a representative, was directed to attend either in person or telephonically. (Prehearing Conference Summary, June 6, 2017). No objection or correction to the June 6, 2016 prehearing conference summary was filed by any party. (Record).

11) On July 19, 2017, after the parties completed their opening arguments, the hearing record is as follows:

DESIGNATED CHAIR: I’m asking Mr. Love right now what their proof is that you were a business that was working as a general contractor. Mr. Love, go ahead.

INVESTIGATOR LOVE: So exhibit seven is licensing printouts for the state of Alaska. And page 67 is Employer’s contractor’s license, number 102633, issued August 5, 2015, listing Margaret Robertson and Joshua Bulard as owners. Page 68 is the actual business license, number 1025175. It lists the business type as a

partnership. The date of issue is August 5, 2015. And the owners as Joshua Bulard and Margaret Robertson and it lists the business name as Bulard General Contracting.

CHAIR: Okay, so the dates that the Division is alleging was April 29, 2015 through June 29, 2016, correct?

INVESTIGATOR: Correct.

CHAIR: Okay, so what is your -- You're saying what, there was five or six employees working during that time?

INVESTIGATOR: There's more than that, but we have evidence of approximately five to seven.

CHAIR: So what's the exhibit numbers for the evidence of the employees, where are those listed?

INVESTIGATOR: Well, there's lots of evidence. I mean, I can't just -- I don't have unfortunately the exhibits and notice of evidence memorized and so, if I'm able to actually present our case, I can probably work through all that.

CHAIR: What do you mean "present your case"?

INVESTIGATOR: Well my understanding...

CHAIR: You just gave your opening argument there.

INVESTIGATOR: I gave an opening statement.

CHAIR: Right, so that was your case, so do you have...

INVESTIGATOR: No it wasn't, that was our opening statement, I'm going to present our case now.

CHAIR: Okay, so you've got about 11 minutes I think left...

INVESTIGATOR: I don't think so. The regulation talks about opening statements and closing arguments, not about actually presenting the case.

CHAIR: Okay, so are you going to examine a witness or call a witness?

INVESTIGATOR: I'm going to testify to the Division's evidence.

CHAIR: Okay, so, well that's what I'm trying to figure out. So what are you going to testify to? So are you just going to read the brief, or just go over all the evidence, because I'm trying to...

INVESTIGATOR: In my four years as working for the Division I've never seen a hearing where a side had 20 minutes to present its entire case.

CHAIR: No, right, that's your argument. That's what I'm saying. But your evidence stands for itself, so you don't need to point to what your evidence is. That's here before us.

INVESTIGATOR: Well, that's not my understanding because the letter that we received a few weeks ago, or a few months ago, from you in essence said that we would have to testify, that the hearing brief and evidence doesn't speak for itself, that we would actually have to present that. And so here I am now at a hearing, because we initially asked for a hearing on the written record, and now we are here at an oral hearing and we'd like to present our evidence, and it's going to take more than 20 minutes to do it.

CHAIR: Okay, like I said, I'm trying to avoid you just reading your brief because I mean, it's self-explanatory so...

INVESTIGATOR: If we choose to read our brief, then that's the way we present our -- and I'm not going to read the brief.

CHAIR: Okay, so then you have some testimony to present above your brief and beyond your brief I guess?

INVESTIGATOR: I'm going to touch on -- I have bullet points I'm going to touch on in reference to the exhibits.

CHAIR: Okay, then if you want to do that, then go ahead.

....

INVESTIGATOR: .... The employer's federal identification number, which is assigned by the IRS, is demonstrated by exhibit eight, page 69. This exhibit was provided to us by an individual named William Offeretti, who happened to be Mark Malpen's friend. Mr. Malpen didn't have capabilities to send the documents via email and so he used Mr. Offeretti to do it. So Mr. Offeretti provided this, and this is exhibit eight, page 69 is a W2 from 2015. Under "employer identification number," it lists 47-460XXXX. It lists the employer as 'Bulard General Contracting.' And that FEIN number is key in this case. The Division conducted a search of the Alaska employment security division tax account number to see if the employer actually reported any of these wages, specifically to Mr. Offeretti's -- To the division of employment security. We could not locate a division account number for Employer. That's exhibit 9, pages 70 and 71. Page 70 shows the search for Bulard General and

then page 71 shows the search using the FEIN number, which yielded no results. The Employer advertised through Craigslist under the assumed name Bulard General Contracting. Exhibit 10, pages 73 through 76 are printouts of Bulard General Contracting, the Employer's, post to Craigslist offering its construction services. It's also on page -- Exhibit 14, pages 146 through 150...

CHAIR: Okay, Mr. Love, so I think you're -- Let me kind of clarify what it means to testify in terms of presenting evidence in the form of testimony. What you're doing right now is you're just reading off, as an index, your brief, basically. So my question is, and you're free to testify on this issue, if you have something to testify to that's above and beyond something that's not in your brief or in your evidence, then we'll welcome that. But just reciting what's named in your brief and then naming the page numbers to that evidence is not helpful. So, is there something you want to testify to that's not in your brief or that's not in evidence because your testimony as to evidence you've filed is not helpful to the main issues in this case. So is there something above what's been filed that you want to testify to? Something that we're missing, basically?

INVESTIGATOR: Again, in the four years, I've never been -- This is the way I've testified in all my hearings...

CHAIR: That's not what I'm asking you.

INVESTIGATOR: I've testified in hearings with you as the hearing officer, and not once have I had...

CHAIR: Hold on a second...

INVESTIGATOR: And not once have you ever stated this to me...

CHAIR: Stop interrupting me...

INVESTIGATOR: It's confusing to me, why you wouldn't allow me to testify like this...

CHAIR: Hold on a second. It's very clear what I'm saying. What you're doing right now is reading the brief and reciting the table of contents of your brief. The brief is there, the evidence stands for itself. So my question is for you, do you have something that you're going to testify to, that's not already in the brief or in the evidence?

INVESTIGATOR: I unfortunately don't have the whole entire case memorized, and so I have to jot down my testimony in bullet points. I'm not reading the brief. There may -- It may be similar, what I'm reading off may be similar, but unfortunately that's how I testify. And I've never had a problem with any other hearing officer to include yourself in the four years that I've been here testifying.

CHAIR: Is there something that's not in the evidence so far that you're going to testify to today?

INVESTIGATOR: Off the top of my head, I can't answer that question, I don't know. The case is so large that I unfortunately -- And I will tell you that I feel in a position that you're being prejudicial to the Division's ability to present its case.

CHAIR: Okay, well I have a responsibility to manage the cases in a timely manner, and it sounds to me like you're just reading off the brief. And I'm just saying that that's redundant -- You don't need to do that because it's already in there, the evidence speaks for itself. So, speaking as to how you discovered a document or something, if that's not in there, then you're welcome to testify to that if you want to, but that's why I keep asking you if there's something that's missing, because what you're here to do today is not read off the brief or read off the evidence. You're here today to testify, as a witness, since you're not an attorney. Your testimony, something in addition to what's already in the record. So that's why I keep asking you is there something you're going to testify to, some piece that has not been filed yet, that we're missing, that would be helpful to the material issues in this case.

INVESTIGATOR: My understanding is that, because it's not a hearing on the written record, if I don't present this, it's not on the record.

CHAIR: That's -- Then your understanding is incorrect, because if it's been filed in evidence, that's evidence, so you don't need to discuss what the evidence is, because the evidence speaks for itself, if it's admissible evidence.

INVESTIGATOR: If the Board is going to accept our evidence, as is, without me having to testify and put it on the record, then yes, there may be some additional individuals that we interviewed that were not part of the amended hearing brief that was required by the Board, that we would testify to -- Conversations with clients and employees.

CHAIR: Okay, so what would be one of those, for example? What type of conversation are you going to testify to?

INVESTIGATOR: Well, the Division interviewed employees and clients who hired, or worked for, the employer, and that conversation includes discussions about the projects that they worked on, when they worked on, the type of work they performed on the job, who were the co-workers...

CHAIR: Have they been filed in the form of an affidavit or deposition or testimony?

INVESTIGATOR: No.



...

INVESTIGATOR: But I'm testifying as to the conversation I had with them, so it would be my testimony of my part of the conversation.

...

INVESTIGATOR: I was under the impression, and it's been like that for the last four years, that we had to present our whole entire case to be able to get the evidence on record, and if it wasn't on the record, at an oral hearing, then the Board could not consider it. So that's the reason why...

CHAIR: That's -- I'm not sure where you got that -- That's not what the law is. So the law is, you get your opening argument, you can file evidence, and then you can testify or call witnesses to supplement that evidence or to explain it.

INVESTIGATOR: So before I begin, I just need clarification that you are -- That the Board is going to accept our evidence and they're going to accept our exhibits, our hearing brief as kind of a road map to the exhibits, to -- If not, then I need to be able to present our evidence.

CHAIR: Right. That's correct. Your hearing brief explains, it's not your evidence.

...

CHAIR: So it sounds like we're getting to that important part. As you said, there's some statements by some witnesses that you said you had, that you want to testify as to that right now?

INVESTIGATOR: Well that all depends on whether or not the Board, once again, is going to accept our brief as part of our testimony. If not...

CHAIR: No. Once again, the brief itself contains your argument, it's the road map of the case. So that sort of outlines what the issues are, what you're going to try to prove, and how you're going to prove that. Okay, so the brief itself it's, as we say, a map. The evidence is what's weighed, it's what's actually used to discover those issues. In certain cases, if you spoke to somebody about an issue in this case, and you want to testify as to that, that's fine. So that's what I'm trying to get out of you. So do you want to get to that part?

INVESTIGATOR: I guess I'm still not following you. I'm not an attorney. And again, I'm only going off what I've done in the past, and this is very odd to me.

...

Without reading my entire hearing brief or my outline that I was going to present, I'm unfortunately going to have to read these to you. So, these are the summaries of my conversations during the investigation of both clients and employees.

CHAIR: And these have not been filed as affidavits or depositions, right, this is just your testimony right now...

INVESTIGATOR: This is just my testimony. So on July 6, 2016 at about 11:58 a.m., I interviewed Mark Malpin, who stated that he was a union carpenter, and that when the carpenters' union had no work, in October of 2015 he was notified by the union that Bulard General Contracting was hiring carpenters. He was hired by and worked for Employer from October 2015 to January 2016. He agreed to work for \$25.00 per hour performing carpentry work for Employer. He claimed to have worked with Ben Swan, Chris Hamilton, and someone by the name of 'Craig' from California...

CHAIR: Okay, so this Mark Malpin, he's not -- So he's a former employee?

INVESTIGATOR: As far as we can tell, based on our evidence, yes he was a former employee.

CHAIR: So you have no direct evidence of what he said, this is just what you're saying he said...

INVESTIGATOR: Well, again, if you would allow me to present my evidence, I'll be able to demonstrate that to you...

CHAIR: Okay, well what I'm going to tell you is that's hearsay, that's textbook hearsay right there. If you've got no direct evidence of what he said, then that's not going to be admissible.

INVESTIGATOR: I didn't know that you were actually the one that was supposed to be objecting to an argument, I thought the employer was.

CHAIR: Well, we apply the law as it is, so whether or not someone objects or not, if something is not admissible, it doesn't come in. So just because there's no one here to object, doesn't mean that inadmissible evidence gets used.

INVESTIGATOR: I can tell you at this point, I don't think the Division is going to receive a fair hearing with you as the hearing officer. I don't think we can continue today.

CHAIR: Okay, are you making a motion for me to be recused then?

INVESTIGATOR: Yes...

The SIU was then directed to present an argument in support of its petition to recuse the chair, which the remaining two panel members would deliberate on outside of the chair's presence and decide. (Record).

12) In support of recusal, the SIU's contentions were: The chair has presided over all prehearing conferences in this case. The SIU contended the chair did not properly telephone all individuals the SIU urged should have been called for those conferences, only Joshua Bulard himself. With regards to the April 3, 2017 hearing brief and evidence which the SIU was informed may have been hearsay by the panel's April 25, 2017 letter, a prehearing was held and the SIU was put in a position where it was not allowed to have a written record hearing only. The SIU was under the impression it would be permitted more than just 20 minutes to present its evidence, which it was not allowed to do at the hearing. The chair had presided over other hearings in other cases with the SIU, and had not objected to similar evidence being presented. The SIU contended it would be in both parties' best interest if the panel recused the chair from this hearing. (Love).

13) Prior to beginning the hearing, neither the SIU nor the Division objected to the chair presiding over the hearing as a preliminary issue. No petition for recusal was filed or asserted at a prehearing. (Record).

14) All four prehearing conferences in this case were held by Hearing Officer Matthew Slodowy, the designated chair at the instant hearing. (Record).

#### 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.

A decision may be based not only on direct testimony and other tangible evidence, but also on "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 23.30.135. 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. . . .

**2 AAC 64.030. Canons of conduct.** (a) The canons of conduct in AS 44.64.050(b) are part of the code of hearing officer conduct. A hearing officer or administrative law judge shall comply with the canons and requirements of 2 AAC 64.010 - 2 AAC 64.090. Noncompliance may be grounds for corrective or disciplinary action under AS 44.64.050(d) and 2 AAC 64.060.

(b) To comply with the requirement

(1) to uphold the integrity and independence of the office and of the hearing function, a hearing officer or administrative law judge shall establish and personally observe high standards of conduct, and avoid improper ex parte communications with private and agency parties about the subject of a hearing request, so that the integrity and independence of the office and the hearing function will be preserved;

(2) to avoid impropriety and the appearance of impropriety, a hearing officer or administrative law judge shall

(A) respect and follow the law;

(B) act in a manner that promotes public confidence in the hearing function;  
and

(C) refrain from allowing familial, social, political or other relationships to influence the conduct of the hearing;

(3) to perform the duties of the office or of the hearing function impartially and diligently, a hearing officer or administrative law judge

(A) shall faithfully follow the law;

(B) shall maintain professional competence in the law;

(C) may not be swayed by partisan interests or fear of criticism;

(D) shall maintain order and decorum in hearings and related proceedings;

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(E) shall show patience, dignity, and courtesy to all parties, their representatives, witnesses, and others with whom the hearing officer or administrative law judge deals in an official capacity, and shall require similar behavior from parties and their representatives;

(F) shall refrain from initiating, permitting, or considering improper ex parte communications;

(G) shall dispose of all hearing-related matters promptly, officially, and fairly;

(H) shall require participants in proceedings to refrain from manifesting personal bias or prejudice against parties, witnesses, their representatives, or others;

(I) shall refrain from making public comment outside of the proceedings on a case before the hearing officer or administrative law judge while the case is pending; and

(J) shall refrain from disclosing or using, for any purpose unrelated to official duties, information acquired in an official capacity that by law is not available to the general public. . . .

**2 AAC 64.040. Conflicts.** (a) A hearing officer or administrative law judge shall refrain from hearing or otherwise deciding a case presenting a conflict of interest. A conflict of interest may arise from a financial or other personal interest of the hearing officer or administrative law judge, or of an immediate family member. . . .

The Alaska Supreme Court has held administrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment. To show hearing officer bias, a party must show that the hearing officer had a predisposition to find against a party or that the hearing officer interfered with the orderly presentation of the evidence. *AT&T Alascom v. Orchitt*, 161 P.3d 1232 (Alaska 2007); *Tachick Freight Lines v. Dep't of Labor*, 773 P.2d 45, 453 (Alaska 1989) (citing *In re Cornelius*, 520 P.2d 76, 83 (Alaska 1974) (finding although the chair ruled against a party on some procedural questions, that alone is not sufficient to show a predisposition to find against that party)).

An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998, 1004 (Alaska 2009).

**8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determination on

(10) discovery requests;

. . .

(13) whether a party intends at the time of hearing to seek recusal of a board member, in accordance with AS 44.62.450(c), from participating in the hearing;

. . . .

**8 AAC 45.105. Code of conduct.**

. . . .

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a conflict of interest that is substantial and material; or

(2) shows actual bias or prejudice.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or

(2) shows actual bias or prejudice. . . .

The “clear and convincing” evidence standard demands “a firm belief or conviction about the existence of a fact to be proved.” *Burton v. Fountainhead Development, Inc.*, 393 P.3d 387, 400 (Alaska 2017). “Clear and convincing evidence has been characterized as evidence that is greater than a preponderance, but less than proof beyond a reasonable doubt.” *Brynnna B. v. State, Dep’t of Health & Soc. Servs., Div. of Family & Youth Servs.*, 88 P.3d 527, 530 n. 12 (Alaska 2004). *Black’s Law Dictionary* defines “clear and convincing evidence” as “[e]vidence indicating the thing to be proved is highly probable or reasonably certain. This is a greater burden of proof than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.” *Black’s Law Dictionary* 596 (8th Ed. 1999).

**8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety.**

....

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005 (b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

**8 AAC 45.120. Evidence.**

....

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

The hearing officer's manual for adjudicative hearings conducted by state executive branch agencies provides:

**Controlling the Hearing.** The hearing officer must control the hearing. The hearing officer has functions and responsibilities analogous to a trial judge:

The deciding officer in an administrative hearing has the responsibility to conduct a trial-like adjudication in a fair manner and to make decisions needed to expedite the adjudication, including regulating the conduct of discovery and ruling on the admission and exclusion of evidence. . . . The deciding officer's functions and responsibilities are analogous to those of a trial judge. . . .

For example, the hearing officer may place reasonable time limits on the presentation of evidence. As soon as the subject under inquiry is exhausted or fully developed, the hearing officer should stop the party or the witness and direct him or her to go to other matters. If the question or answer is irrelevant or improper, the hearing officer should strike it without waiting for an objection. . . . *Hearing Officer's Manual*, Alaska Department of Law 62 (5th Ed. 2002).

ANALYSIS

**Was the oral order recusing the designated chair correct?**

There is no evidence the chair has actual bias, a financial interest, or is unable to decide the case fairly and impartially. 2 AAC 64.030. There is also no evidence of an actual conflict of interest. 2 AAC 64.040. The panel has a duty to ensure hearings in workers' compensation cases are impartial and fair to all parties and that all parties are afforded due process and an opportunity to be heard, and for their arguments and evidence to be fairly considered. AS 23.30.001(1)-(4).

The SIU contends the Division will not receive a fair hearing with the chair presiding as the hearing officer, because the process and procedure of previous cases was not followed here, resulting in confusion. *Rogers & Babler*. The SIU also contends the chair made evidentiary rulings without an objection by a party, demonstrating a lack of fairness. The chair was recused from the case to avoid the appearance of impropriety. 8 AAC 45.105; 8 AAC 45.106. The decision to order recusal of Hearing Officer Slodowy from this case was correct. AS 23.30.001; AS 23.30.135.

CONCLUSION OF LAW

The oral order recusing the designated chair was correct.

ORDER

Hearing Officer Matthew Slodowy will be recused from presiding over this and future proceedings in this case.

Dated in Anchorage, Alaska on July 21, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/  
Amy Steele, Member

/s/  
Stacy Allen, Member



DISSENT OF DESIGNATED CHAIR MATTHEW SLODOWY

Hearing officers are presumed to be honest and impartial. *Orchitt*. The burden of showing otherwise is on the party seeking to have the hearing officer disqualified from a case. *Id.* A party alleging a panel member demonstrates a conflict of interest, impropriety, or the appearance of impropriety must file a petition before a scheduled hearing begins, which must be shown by clear and convincing evidence, a higher burden of proof than a preponderance of the evidence. 8 AAC 45.106; *Burton*; *Brynna B.*

The Department of Law directs the hearing officer to control the hearing, to conduct the adjudication in a fair manner, and to make decisions needed to expedite the adjudication, including regulating the conduct of discovery and ruling on the admission and exclusion of evidence. The adjudicator is not required to wait for a party to object to inadmissible evidence; rather, he should strike it without waiting for an objection. *Hearing Officer's Manual*, 62. The Alaska Supreme Court has held an adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow*. The SIU's contention the designated chair improperly excluded evidence where no objection was made is without merit. *Id.*; 8 AAC 45.120.

Importantly, the SIU did not raise any objection to the chair's presiding over this case or file a petition in advance of the hearing, as required where a party alleges bias or conflict, even though it had many opportunities to do so. 8 AAC 45.065(13); 8 AAC 45.105; 8 AAC 45.106. The SIU did not make its oral petition to recuse the chair from the hearing until it received an adverse ruling on an evidentiary issue, and after opening arguments were concluded. The SIU also did not file an objection or correction to the prehearing conference summary of June 6, 2017, which set the oral hearing the SIU requested in its May 22, 2017 petition.

The SIU failed to produce any evidence the chair violated any statute or regulation, had any conflict of interest, behaved in an unethical manner, demonstrated impropriety or created the appearance of impropriety, or was dishonest or biased against the SIU. AS 39.52.110; AS 44.62.450(c); 2 AAC 64.070. *Orchitt*. The SIU did not point to any evidence in support of its sudden oral petition for recusal other than general allegations of unfairness. To the contrary: the chair previously ruled in the SIU's favor, granting its August 31, 2016 petition to compel discovery from Employer at the

*In re* BULARD GENERAL CONTRACTING

September 29, 2016 prehearing conference. As for the SIU’s contention it was not permitted to hold a hearing only on the written record, the SIU’s own May 22, 2017 petition explicitly requested scheduling of an oral hearing, and so this argument is without merit as well.

Although Board decisions do not carry precedential weight in other cases, allowing a party to obtain recusal of a panel member where there is no evidence of actual bias, conflict, or impropriety sends a dangerous message about the integrity of the adjudicative process. The chair respectfully disagrees with the majority’s basis for the recusal, and dissents from the majority decision.

/s/  
Matthew Slodowy, Designated Chair

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 Final Decision and Order in the matter of JOSHUA BULARD and MARGARET ROBINSON d/b/a/ BULARD GENERAL CONTRACTING; Employer / respondent; Case No. 700004904; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties by First-Class U.S. Mail, postage prepaid, on July 21, 2017.

/s/

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Nenita Farmer, Office Assistant