

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)
FOR A FINDING OF THE FAILURE TO) INTERLOCUTORY
INSURE WORKERS' COMPENSATION) DECISION AND ORDER
LIABILITY, AND ASSESSMENT)
OF A CIVIL PENALTY AGAINST,) AWCB Case No. 700004904
)
JOSHUA BULARD and MARGARET) AWCB Decision No. 17-0116
ROBERTSON, d/b/a BULARD GENERAL)
CONTRACTING,) Filed with AWCB Anchorage, Alaska
) on September 29, 2017
Employer.)
)

The Division of Workers' Compensation, Special Investigations Unit's (SIU) Petitions for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, were heard in Anchorage, Alaska on September 27, 2017, a date selected on August 22, 2017. Investigator Doug Love appeared, represented the SIU and testified. Joshua Bulard did not appear. The designated chair called Bulard's telephone number and reached Margaret Robertson, who provided Bulard's current telephone number. The chair then called Bulard's number and reached Jenahe Richardson who identified herself as Bulard's fiancée. Richardson said she would try to contact Bulard, whom she said was attending a family reunion in Fairbanks, and have him call a direct line to the hearing room. After waiting approximately 20 minutes with no response from Bulard, the hearing began. As a preliminary matter, Robertson said a prior decision had dismissed her as a party. She further requested a hearing continuance on grounds her brother, Bulard, was not physically or mentally capable of participating in a hearing. After deliberation, the panel issued an oral order continuing the hearing based on Robertson's testimony. This decision examines the oral order to continue the hearing. The record closed at the hearing's conclusion on September 27, 2017.

ISSUE

Robertson contended her brother Joshua Bulard, the real party in interest in this case, was physically and mentally unable to participate in the hearing. She contended he had an undiagnosed mental health issue, which rendered him incapable of understanding legal proceedings or actively providing any useful information. She requested a hearing continuance.

The SIU contended Robertson made the same claim at a previous hearing in this case but Bulard subsequently participated effectively in that hearing. It contended this failure to insure petition has been ongoing for more than a year with no cooperation from either business partner, Robertson or Bullard. The SIU opposed Robertson's request for a hearing continuance.

Was the oral order continuing the hearing correct?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 19, 2017, the parties appeared for a hearing on the division's petitions. Robertson appeared by telephone but Bulard initially did not appear. At the June 19, 2017 hearing, a question arose concerning Robertson's role in this case. Upon questioning by the hearing officer, Robertson contended she had nothing to do with Bulard General Contracting, other than to assist her brother Joshua Bulard in filling out initial paperwork to file and obtain a business license. The following colloquy took place:

Hearing Officer: Okay. And Ms. Robertson will you please state your name for the record?

Robertson: Margaret Robertson.

Hearing Officer: And, who are you with, this company?

Robertson: I'm nobody.

Hearing Officer: So why are you calling in today?

Robertson: I'm calling in today because I keep getting notices from the workers' compensation with all these claims against my brother in his business. And, so I'm calling in because I don't want nothing to do with this. And, if my brother's

acting illegally in doing things, that's on him. This business isn't even a business. . . . I just really don't want nothing to do with this.

. . . .

Hearing Officer: So, I guess first we need to figure out if you even need to be here. So, Mr. Love, do you have any take on what Ms. Robertson just said about her role in all this?

Love: The division will present evidence that shows that Ms. Robertson is a partner in the business.

Hearing Officer: Okay. So, Ms. Robertson, you are not a partner in this business you're saying; you have nothing to do with this business?

Robertson: Nope. All I did is when my brother, he used to run a previous business in Juneau, and then when he moved to Anchorage he called me one day and asked me to help him open the current business Bulard General Contracting and help him to do like the licensing and stuff the paperwork because he said he didn't know what he was doing. So I helped and when I did, I had to put my name and stuff on it. I paid for the workers' compensation policies and the insurance through his business account for him and that's all I've ever done with this business. And then, once I found out . . . that the workers' compensation policy was canceled without our knowledge in December, due to an underwriting issue by the company we purchased everything through, I called and messaged in and had the business license and everything canceled. . . . So that my name was not attached to this business anymore.

. . . .

Hearing Officer: So I guess first we sort of need to figure out your [Robertson's] role in all of this. It's your choice whether or not you want to stay. I mean, I can't force you to. . . .

. . . .

Hearing Officer: Okay. Well, why don't we at least try like a cell phone number for him [Bulard] if we can reach him or not. Because, again, the petition is against him, and it's his business, so we should at least try to reach him.

Robertson: Okay. So the petition is against him?

Hearing Officer: Well, the petition is against the business and anybody that's operating the business. . . .

. . . .

Robertson emphasized that, in her view, she had absolutely nothing to do with the business other than initially assisting her brother. She reiterated that she participates in the case because she

keeps getting notices from the board. Robertson made it clear she wants “nothing to do with” this case because she never “operated” her brother’s business.

Hearing Officer: Okay. So, I guess I’ll start out by just saying, I mean, I can’t force you to stay on the phone. So, if you want to get off the phone and you don’t want to participate, then, then that’s fine. I mean I can’t, you know I can’t compel you to stay on the phone. So if, if you’re saying that you don’t want to have anything to do with the business and you want to get off the phone, that’s fine. Mr. Love will probably present some kind of evidence that you did have had something to do with the business. . . . So it’s your choice if you want to stay on the line or if you just want to let the division put on their argument.

Robertson: I’ll just stay on the phone. . . .

The designated chair initially was unable to contact Joshua Bulard by telephone, but left a message.

Hearing Officer: Okay, so I guess we’ll just sort of do the preliminary issue. I guess, Mr. Love do you want to sort of talk about Ms. Robertson’s role in all this first so we can let her go if she’s not involved in it?

At this point in the hearing, investigator Love presented written evidence showing Robertson was an owner of, and a partner in, Bulard General Contracting.

Hearing Officer: . . . So what’s your [Robertson’s] response to that?

Robertson: . . . Yes, I did put the licensing in place; I did it at the request of my brother. My understanding at the time, now I know is different, is that he had another license . . . and I got a call from him . . . the only way he could get a license was if somebody went on the license with him while he got his stuff up and running. So, that’s what I did. That’s the extent of my doing anything for this business, was to help him out by getting the licensing in place, which I did through the state. . . . Yes, my name may be on it. . . .

Hearing Officer: . . . So once again, I’ll say Ms. Robertson it’s your choice whether or not you want to stay on the phone. So, Mr. Love is going to present other evidence I guess of this business operating. **I mean I can’t make the legal decision right now whether or not you’re involved in the business.** . . . So, the issue that I guess I’m seeing here is you actually may not have any sort of authority to discuss any business issues here.

The hearing panel took a break to deliberate and to discuss “how to move forward.”

Hearing Officer: So, after considering the parties' representations and the evidence . . . we've decided that you probably don't have authority to even discuss this case on your brother's behalf or on the business' behalf. Okay. So, again, it's your choice whether or not you want to stay on the phone or not. But the problem I'm having here is if your role in the business was as limited as it was, you know, Mr. Love is going to present some argument and then you're going to say this happened or that happened and then further down the line somewhere your brother could come back in and say, 'Well wait a second, my sister didn't have any authority to speak in my behalf anyway.'

Robertson: Yeah. Well, I don't know anything about what he did or did not do.

Hearing Officer: Okay. So **that's going to be our first sort of preliminary decision**, so you can stay on the phone and listen if you want to, **but were not going to take any testimony from you today or any argument from you today**. So it's up to you whether or not you want to stay on the phone or not.

Robertson: Well, I'll go ahead and get off the phone. I appreciate you guys listening and taking into, my role in this into consideration.

Hearing Officer: Okay, then we will let you go then. . . .

At this point in the hearing, Robertson terminated the telephone call. A few minutes later, Joshua Bulard called the hearing room to participate in the hearing. The following occurred:

Hearing Officer: [Phone ringing] Oh, we've got someone on the phone. This is the hearing room.

Bulard: Hello. . . . My name is Joshua Bulard.

Hearing Officer: . . . We spoke to your sister earlier, I guess. And, she, we let her go. . . .

Bulard: . . . You already spoke to her?

Hearing Officer: We spoke to her briefly. She said she had nothing to do with the business, so we let her go (emphasis added). (Record, July 19, 2017).

- 2) At no point in the July 19, 2017 hearing did the hearing officer or the board panel dismiss Robertson as a party to this case. (Experience, judgment and inferences drawn from the above).
- 3) Robertson is still a party to this case. (*Id.*).

4) Later in the hearing, the panel disqualified the hearing officer based on the SIU's objection. (*In re Bulard General Contracting, et al*, AWCBC Decision No 17-0083 (July 21, 2017) (*In re Bulard I*)).

5) On September 27, 2017, a second hearing on the division's petitions convened with a new hearing officer. The hearing panel included member Steele, who had participated in *Bulard I*; the other board member had not participated in *In re Bulard I*. (*Id.*).

6) Robertson appeared by telephone at the hearing, but Bulard did not appear. A call to Bulard's telephone connected with Jenahe Richardson, who identified herself as Bulard's fiancée. Richardson said Bulard was unavailable and was attending a family reunion in the Fairbanks area with his sister. She agreed to call Bulard at a Fairbanks hotel and ask him to call directly to the hearing room immediately. (Observations).

7) The hearing lasted approximately 45 minutes longer and Bulard did not participate in the September 27, 2017 hearing. (Record, September 27, 2017).

8) Robertson disputed Richardson's comments and noted Robertson was Bulard's only family and he was not with her and not at a family reunion in Fairbanks. Robertson explained in some detail her first-hand knowledge of her brother's physical and mental difficulties and opined he was not able to participate in the hearing even were the chair successful in connecting with him on the telephone. Robertson said Bulard lost custody of his three children and she was caring for them under state authority. She further said Bulard was mentally incompetent, confused, had anger issues and lacked understanding. Though she conceded her brother had no medical care to address this situation, Robertson was attempting to help him. Throughout the hearing, Robertson insisted the board had previously "excused" her from further participation at further proceedings and implied the board dismissed her as a party to this case. Ultimately, Robertson requested a hearing continuance so her brother could improve and participate at a future hearing. (Robertson).

9) Though her understanding of her status as a party in this case is incorrect, Robertson's testimony was credible. (Experience, judgment, observations and inferences drawn from the above).

10) The division objected to a hearing continuance on grounds no medical evidence supported Robertson's testimony, Bulard's unavailability was a "continued theme," and the case had been

ongoing for more than a year with no cooperation from either Robertson or Bulard. The division offered to change the hearing from oral to a written record hearing with briefs. (Love).

11) After lengthy deliberation, the panel granted Robertson’s request for a hearing continuance. The panel found “good cause” for a continuance because Bulard, a material witness, was not available and deposing him was not feasible, and Bulard, a party, had become ill. The panel found Bulard had not received a written hearing notice because his address, though partially correct, lacked an apartment number and the United States Postal Service had returned his mail including a prehearing conference summary and a hearing notice. The panel further found a hearing continuance presented no prejudice to the division. (Record, September 27, 2017).

PRINCIPLES OF LAW

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

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The board’s credibility findings are “binding for any review of the Board’s factual findings.” *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

8 AAC 45.130. Findings and awards and orders. The board will prepare and serve the findings and award as well as all other orders in these proceedings.

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

- (1) good cause exists only when

(A) a material witness is unavailable on the scheduled hearing date and deposing the witness is not feasible;

....

(C) a party . . . or a material witness becomes ill. . . .

ANALYSIS

Was the oral order continuing the hearing correct?

Robertson requested a hearing continuance on September 27, 2017, because she alleged her brother Joshua Bulard, a party to this case, was experiencing physical and mental difficulties. Robertson candidly described her first-hand knowledge of Bulard’s issues, which in her opinion precludes him from participating in the hearing. Bulard’s problems are serious enough to affect his legal right to parent his three children, all of whom are currently in Robertson’s temporary custody. Robertson credibly testified her brother has not had medical treatment to address his issues; thus, there are no medical records to support her testimony. Nevertheless, Robertson’s testimony concerning her brother’s current physical and mental health was credible. AS 23.30.122; *Smith*.

Furthermore, Robertson remains ““a party”” to this case and thus had standing to request a hearing continuance. 8 AAC 45.074(a). Robertson misunderstood the oral order issued, but not memorialized, in *In re Bulard I*. 8 AAC 45.130. The designated chair did not dismiss Robertson as a party to this case; he simply declined to take evidence or argument from Robertson because she insisted she had nothing to do with the business subject of the petitions, and the chair did not want a person who potentially was not the employer’s representative to offer testimony or evidence at hearing. The chair expressly stated, “I mean I can’t make the legal decision right now whether or not you’re involved in the business.” *Rogers & Babler*. It remains an open issue if Robertson or Bulard bear any personal liability for any civil penalty in this case. Nevertheless, as ““a party”” Robertson had a right to request a continuance when her brother was unable to participate at hearing. Since she remains “a party,” her brother’s testimony may directly affect her possible liability in this case. “Good cause” supported her request. 8 AAC 45.074(b)(1)(A), (C). The oral order continuing the September 27, 2017 hearing was correct.

It is crucial that Robertson and Bulard understand they both remain party defendants in this matter. Decisions in this case may bind them both. Robertson retains her right to remain silent, explain why she is not a partner in this business or provide any other testimony or evidence she wants. Bulard retains these same rights. However, failure to appear at prehearing conferences or hearings is a poor practice. *Rogers & Babler*. Bulard should keep his address updated with the division so he can receive notices of prehearing conferences and hearings. Otherwise, these proceedings may go forward without his participation. In the event a party cannot attend a future prehearing conference or hearing in this case because of physical or mental illness that party should provide a medical record signed by a physician to support a hearing continuation on those grounds.

CONCLUSION OF LAW

The oral order continuing the hearing was correct.

ORDER

- 1) The parties will attend a prehearing conference on a mutually available date to schedule a new hearing on the SIU's petitions.
- 2) The parties will update their telephone numbers and mailing addresses, to include apartment numbers as appropriate.

Dated in Anchorage, Alaska on September 29, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Amy Steele, Member

_____/s/
Pat Vollendorf, 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 *In re* Bulard General Contracting, et al, employer / defendants; Case No. 700004904; 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 September 29, 2017.

_____/s/
Nenita Farmer, Office Assistant