

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

ASOKA SENEVIRATNE,)
Employee,)
Claimant,) FINAL DECISION AND ORDER
v.)
AWCB Case No(s). 200503146
AIRPORT EQUIPMENT RENTALS INC,)
Employer,) AWCB Decision No. 17-0130
and) Filed with AWCB Fairbanks, Alaska
LIBERTY NORTHWEST INSURANCE)
COMPANY,) on November 20, 2017
Insurer,)
Defendants.)

On July 21, 2017, *Seneviratne v. Airport Equipment Rentals Inc.*, AWCB Decision No. 17-0084 (July 21, 2017) (*Seneviratne I*) issued, addressing Airport Equipment Rentals Inc. and Liberty Northwest Insurance Co.'s (Employer) petition to dismiss the case. *Seneviratne I* denied Employer's petition to dismiss pursuant to AS 23.30.110(c). On August 4, 2017, Employer filed a petition for reconsideration of *Seneviratne I*. The petition was timely and the board allowed the parties to file supplemental briefing. The record closed on October 20, 2017 when the Employee filed supplemental briefing.

ISSUE

Employer contends Employee formerly withdrew his ARH. Employer also contends Employee was required to file an ARH on each subsequent claim. Employer requests dismissal of the case.

Employee contends the board's decision should be upheld.

Should *Seneviratne I* be reconsidered?

FINDINGS OF FACT

All findings in *Seneviratne I* are incorporated herein. The following facts are undisputed or reiterated from *Seneviratne I*, undisputed, or are established by a preponderance of the evidence:

- 1) On October 4, 2005, Employee sustained injuries when he was involved in a single vehicle rollover accident while driving for Employer. (Report of Occupational Injury or Illness, November 14, 2005).
- 2) On December 6, 2005, attorney John Franich filed an entry of appearance as Employee's counsel. (Entry of Appearance, December 6, 2005).
- 3) On December 12, 2005, Employee filed a workers' compensation claim (WCC), seeking temporary total disability (TTD) benefits beginning on October 4, 2005, medical benefits, penalties, interest, and attorney's fees. (WCC, December 9, 2005).
- 4) On December 22, 2005, the division served Employee's December 9, 2005 claim on Employer's insurer only, by certified mail with a return receipt requested. (*Id.*).
- 5) On May 15, 2006, Employer filed and served by mail a controversion based on an alleged lack of authorization for ongoing time loss benefits from a physician. (Controversion Notice, May 8, 2006).
- 6) Adding three days because Employer served the Controversion Notice by mail, Employee had to request a hearing or ask for more time to request a hearing by no later than May 19, 2008, since May 18, 2008 was a Sunday. (Experience, judgment and inferences drawn from the above).
- 7) On June 28, 2006, Employee filed an affidavit of readiness for hearing (ARH) on his "December 12, 2005" claim for "TTD, penalties, interest and attorney fees." The ARH states it was served on Liberty Northwest Insurance Company on June 28, 2006. (ARH, June 28, 2006).
- 8) By June 28, 2006, Employee had filed only one claim. The record is clear that the ARH pertained to the December 9, 2005 claim. There is no evidence the division returned Employee's June 28, 2006 ARH to him because it was deficient. Employee's service of the ARH on the insurer only was consistent with the way the division served the WCC on the insurer only. (Observations).

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- 9) Employee timely filed and served a hearing request on his only pending claim, well within the deadline under AS 23.30.110(c). (Experience, judgment and inferences from the above).
- 10) On July 17, 2006, attorney Matthew Teaford entered his appearance for Employer and its insurer. (Entry of Appearance, July 14, 2006).
- 11) On July 17, 2006, Employer filed an Affidavit of Opposition (AO) to Employee's ARH, argued discovery was not complete and the ARH was defective because it was not served on Employer and there was no indication it was filed with the Board. Employer also filed an answer to Employee's December 9, 2005 claim this same date. (AO; Answer, July 14, 2006).
- 12) On February 16, 2017, Employee underwent an employer's medical examination (EME). (EME Report, February 16, 2017).
- 13) On March 6, 2007, Employer filed a controversion notice based on the EME report. (Controversion Notice, March 6, 2007).
- 14) On May 23, 2007, Employee filed another ARH on his "December 12, 2005" WCC and served it on Employer's attorney only. (ARH, May 22, 2007).
- 15) There is no evidence in the record suggesting the division returned Employee's May 22, 2007 ARH to him because it was deficient. (Observations).
- 16) On May 31, 2007, Employer filed an AO to the ARH, argued discovery was not complete and a Second Independent Medical Examination (SIME) may be necessary. (AO, May 31, 2007).
- 17) On July 31, 2007, a prehearing was held and the parties stipulated to a second independent medical examination (SIME). An SIME report issued on May 28, 2008. (Prehearing Notes in ICERS, July 31, 2007); (SIME Report, May 28, 2008).
- 18) On June 12, 2008, Employer filed a controversion notice based on the EME and SIME physician opinions. (Controversion Notice, June 12, 2008).
- 19) On June 23, 2008, a PHC was held and the discussion section states: "The parties attending this PHC have received and reviewed the SIME report. Mr. Franich will talk to client about proceeding with this claim and does not want the board to take any further action at this time." Employee also amended his claim to include compensation rate, PPI, and reemployment benefits. (PHC Summary, June 23, 2008.)

- 20) On July 15, 2008, Employer filed another controversion based on the EME and SIME physician opinions. Employer also filed an answer to the Employee's amended claim on the same date. (Controversion Notice; Answer, July 14, 2008).
- 21) On May 13, 2009, John Franich withdrew as Employee's counsel, stating he had instructed Employee on any pending deadlines or hearings. (Notice of Withdrawal as Counsel, May 13, 2009).
- 22) On September 24, 2014, Employee filed a claim, seeking TTD, permanent total disability (PTD), PPI, medical and transportation costs, and reemployment benefits. (WCC, September 24, 2014).
- 23) On October 20, 2014, Employer filed an answer and controversion, citing a defense under AS 23.30.110(c). (Answer and Controversion Notice, October 20, 2014).
- 24) On November 1, 2016, Employee filed a notice of appearance authorizing William Taunauu to act as his non-attorney representative in his case. (Notice of Appearance, November 1, 2016).
- 25) On November 1, 2016, Employee filed a claim for PTD, medical and transportation costs and penalty. (WCC, November 1, 2016).
- 26) On November 28, 2016, Employer filed an answer and controversion, citing a defense under AS 23.30.110(c). (Answer; Controversion Notice, November 28, 2016).
- 27) On December 6, 2016, Employee filed a notice of appearance authorizing Saye Blendolo Gatei to act as his non-attorney representative. (Notice of Appearance, December 6, 2016).
- 28) On December 7, 2016, Employee's representative, Saye Gatei, appeared at a prehearing conference and said the prehearing conference was premature, as he still needed to get his medical records together. Employee's representative was advised that he could work with a workers' compensation technician to file the medical records as a medical summary and that he also needed to serve Ms. Miller. Ms. Miller also needed to conduct more discovery. Employee's representative was going to request another prehearing when he was ready. (PHC Summary, December 7, 2016).
- 29) On January 27, 2017, Employer filed a petition to dismiss Employee's claims pursuant to AS 23.30.110(c). (Petition to Dismiss, January 27, 2017).
- 30) On June 8, 2017, a hearing was held on Employer's petition to dismiss. Employee's non-attorney representative stated he attempted to fax certain medical records the day of the hearing,

but they did not go through. The panel left the record open to allow Employee to file the records and for Employer to respond. (Hearing Record, June 8, 2017).

31) Employee did not file the medical records. (Record).

32) On July 21, 2017, *Seneviratne I* issued, ruling in favor of the Employee on the AS 23.30.110(c) issue, finding that he filed an ARH within the relevant timeframe. (July 21, 2017, *Seneviratne I*).

33) On August 4, 2017, Employer filed a petition for reconsideration of *Seneviratne I*. (Petition, August 4, 2017).

34) On August 11, 2017, the panel issued a letter stating that it would hear the petition on reconsideration and gave the parties until September 18, 2017 to file any additional briefing regarding the issues raised in the Employer's petition for reconsideration. (Letter, August 11, 2017).

35) On September 18, 2017, Employee filed a petition for an extension of time to file his brief. Employee stated he is on a list to see the doctor, but that the list is long. (Petition, September 18, 2017).

36) On October 5, 2017, Employer filed an opposition to the Employee's petition for an extension of time. (Opposition, October 5, 2017).

37) On October 13, 2017, the designee held a prehearing and the parties agreed the Employee would have until October 20, 2017 to file a supplemental brief. (PHC Summary, October 20, 2017).

38) On October 20, 2017, Employee filed supplemental briefing. (Briefing, October 20, 2017).

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

...

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, 533-34 (Alaska 1987).

AS 23.30.130. Modification of awards. (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may . . . before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

AS 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

A party to a workers' compensation case has three methods by which to pursue its position before a board order is final: 1) The party may raise the issue in a pleading; 2) petition for review of the case within the time limits set forth in AS 44.62.540; or 3) in the case of an alleged factual mistake or a change in conditions, it may ask the board to exercise its discretion to modify the award at any time until one year after the order was entered, under AS 23.30.130. The appropriate recourse for legal error allegations is a direct appeal or petition to the board for reconsideration of the decision under AS 44.62.540(a). Modification under AS 23.30.130(a) is not appropriate when a party is alleging the board committed a mistake of law. *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734 (Alaska 2005).

ANALYSIS

Employer moved to dismiss this case pursuant to AS 23.30.110(c). Employee's current representative is not an attorney and did not become involved in the case until December 6, 2016, well after the ARH's had been filed in this case. Employee's representative was unable to

address the technical legal and procedural issues at hearing in regards to AS 23.20.110(c). He instead assumed Employee had not met his procedural requirements, and argued that Employee was incapacitated and that the procedural requirements should therefore be waived.

When the panel reviewed the record, it found Employee's attorney filed an ARH within the two-year post-claim controversion deadline and declined to dismiss the case. The panel also treated Employee's subsequent claims as amendments to his original claim upon which a valid ARH was filed.

Employer moved for reconsideration and contends the May 22, 2007 ARH was withdrawn at the June 23, 2008 prehearing. Since this issue was not addressed by the panel, the panel allowed the parties to file supplemental briefing. Employee's representative moved for an extension to file the briefing to enable Employee to see a doctor. The designee scheduled a prehearing and the parties discussed that the briefing should address the procedural legal issues raised in Employer's petition. The representative did file a supplemental brief, but remains focused on the merits of the case.

The prehearing summary documenting the June 23, 2008 prehearing states: "The parties attending this PHC have received and reviewed the SIME report. Mr. Franich will talk to client about proceeding with this claim and does not want the board to take any further action at this time." Employee also amended his claim to include claims for a compensation rate adjustment, PPI, and reemployment benefits. Employer does not clarify how Employee's actions at the prehearing constitute a withdrawal of the ARH. Employer cites to *Alaska Mech., Inc. & Zurich Am. Ins. Co. v. Harkness*, AWCAC Dec. No. 176, (Feb.12, 2013), as an example of a situation where an ARH was withdrawn. *Alaska Mech.* is distinguishable from the present case because in *Alaska Mech.*, Employee's attorney entered an appearance after the Employee had filed an ARH, formerly withdrew the ARH at a prehearing and agreed with the Employer to pursue an SIME. The PHC summary specifically stated the ARH was withdrawn by the Employee's attorney, the parties' intentions to pursue an SIME and that Employee would file another ARH if necessary. (*Id.*) That is not the case here. An ARH is not formally withdrawn simply because a hearing is not scheduled. Employer has not provided any authority that supports a finding Employee withdrew his ARH.

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The panel notes there were two ARH's filed within the two-year post-claim controversion period. Employer contends the first ARH, filed on June 28, 2006, was not properly served because it was served on the insurance company only. However, this issue is moot, as there is no dispute the second ARH, filed on May 23, 2007, is valid.

Employer also contends Employee must file an ARH on every subsequent amended claim that is controverted, despite the filing of a valid ARH on the original claim. Employer has similarly not provided any authority on this issue warranting reconsideration. Employer's petition for reconsideration will be denied.

CONCLUSION OF LAW

Seneviratne I should not be reconsidered.

ORDER

Employer's August 4, 2017 petition for reconsideration is denied.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of ASOKA SENEVIRATNE, employee / claimant; v. AIRPORT EQUIPMENT RENTALS INC, employer; LIBERTY NORTHWEST INSURANCE COMPANY, insurer / defendants; Case No. 200503146; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on **November 20, 2017**.

/s/ _____
Ronald C Heselton, Office Assistant II