

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION FOR)
A FINDING OF FAILURE TO INSURE)
WORKERS' COMPENSATION) INTERLOCUTORY
LIABILITY, AND ASSESSMENT OF A) DECISION AND ORDER
CIVIL PENALTY AGAINST:)
) AWCB Case No. 700004562
)
SUPREME ELECTRIC, LLC,) AWCB Decision No. 15-0052
)
Employer,) Filed with AWCB Anchorage, Alaska
Respondent.) on May 6, 2015
)

The Division of Workers' Compensation, Special Investigations Unit's (division) Petition for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty, was heard in Anchorage, Alaska on May 5, 2015, a date selected on March 23, 2015. Investigator Douglas Love appeared, represented the Special Investigations Unit and testified. Keith Willard appeared, represented Supreme Electric, LLC (Employer), and testified. Justin Morgan testified on Employer's behalf. The record remained open at the hearing's conclusion. An oral order was issued continuing the hearing. This decision memorializes the order continuing the hearing.

ISSUE

At a prehearing held on March 23, 2015, an April 23, 2015 hearing date was established and deadlines were set for filing evidence, witness lists, and briefs. Subsequent to the prehearing, the board upon its own motion changed the hearing date to May 5, 2015. Employer filed its brief on April 28, 2015, and the division objected contending it was not filed pursuant to the deadlines established in the prehearing conference summary. Employer contended its brief and exhibits were timely filed because he was advised by a workers' compensation officer the filing deadline

was April 28, 2015. Employer requested a continuance because witness Carol Brady was unavailable on May 5, 2015.

Was the order continuing the hearing correct?

FINDINGS OF FACT

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

- 1) The parties stipulated to most relevant facts and issues. The disputed issues include whether Employer's workers' compensation policy was cancelled due to Employer's failure to comply with the carrier's requests or procedures, and the number of aggravating factors applicable in this case. (Parties' stipulations at hearing).
- 2) On December 19, 2014, the division filed its affidavit of readiness for hearing (ARH) and its hearing brief. (Workers' Compensation ICERS database, December 19, 2014)
- 3) On March 23, 2015, a hearing was docketed; however, Employer's representative Mr. Willard requested a continuance because he was called to appear to testify before the grand jury in a criminal matter against Employer's former administrative employee, Ryan Bacon, who has been charged with a crime for embezzling over \$54,000.00 from Employer. (Petition, March 23, 2015; Willard)
- 4) Employer filed its witness list and hearing brief on April 28, 2015, attached to which was correspondence and e-mails between Investigator Love and Mr. Willard, an e-mail from Carol Brady, an underwriter with State Farm Insurance Company, and e-mail strings between Liberty Mutual's auditor DeAnn Bigham and Employer. (Employer's Hearing Brief and attachments, April 28, 2015).
- 5) Employer relied upon the attachments to its brief to support its contention its workers' compensation insurance policy was wrongfully cancelled. (Willard, Morgan)
- 6) The division asserted the brief and attachments were filed late and should not be considered; however, if they were to be considered, the division wished to provide rebuttal evidence. (Love).
- 7) Employer wished to call Carol Brady and DeAnn Bigham as witnesses; however, Mr. Willard and Mr. Morgan both testified they were notified at the March 23, 2015 prehearing by the board designee that subpoenas carry no weight and a witness does not have to appear, therefore, Employer did not attempt to subpoena Ms. Bigham. (Willard; Morgan).

8) Carol Brady was not available to testify at hearing because she was out of town. The facts to which Ms. Brady would testify are her recollection of “the mix up regarding the audits with Liberty Mutual.” (Email to Keith Willard and Justin Morgan from Carol Brady, April 24, 2015).

9) Based upon attachments to Employer’s brief, and Mr. Love’s testimony regarding his rebuttal evidence, further evidence is necessary to ascertain if Employer’s workers’ compensation policy was cancelled due to Employer’s failure to comply with the carrier’s requests or procedures. This evidence should include the testimony of an unavailable witness, Carol Brady. (Love, Willard, Morgan).

PRINCIPLES OF LAW

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 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

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

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

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

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

.....

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

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

ANALYSIS

Was the order continuing the hearing correct?

AS 23.30.135 grants liberal statutory authority in the conduct of hearings, and hearings are to be conducted to best ascertain the parties' rights. Under 8 AAC 45.070(a), "A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter. . . ." The regulation governing continuances, 8 AAC 45.074, provides, a hearing may be continued only for good cause and good cause exists under several situations, including when a material witness is unavailable and taking the witness's deposition is not feasible. Good cause also exists when "despite a party's due diligence in completing discovery" before filing its ARH, "evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing." If due process requires the party requesting the hearing be given an opportunity to obtain rebuttal evidence, there is good cause to continue the hearing. Good cause also exists when additional evidence or arguments are necessary to complete the hearing.

At hearing, both Employer and the division presented new evidence not in the record and which had not been filed or served upon the opposing party. This evidence and Carol Brady's testimony will assist in determining if Employer's workers' compensation insurance policy was cancelled due to Employer's failure to comply with the carrier's requests or procedures, and the number of aggravating factors applicable in this case. To best ascertain the rights of all parties and assure all parties are provided due process, good cause existed to continue the May 5, 2015 hearing. AS 23.30.135.

CONCLUSION OF LAW

The order continuing the hearing was correct.

ORDER

- 1) On or before May 15, 2015, Employer will file with the Alaska Workers' Compensation Board and serve upon the division all documentary evidence read into the record at the May 5, 2015 hearing, in addition to any other documentary evidence of communications between Employer and Carol Brady, and Employer and DeAnn Bigham.
- 2) On or before May 15, 2015, the division will file with the Alaska Workers' Compensation Board and serve upon Employer all documentary evidence regarding Liberty Mutual Insurance Company's audit timeline read into the record at the May 5, 2015 hearing.
- 3) On or before May 15, 2015, Employer will file with the Alaska Workers' Compensation Board and serve upon the division evidence of Employer's gross annual income and net annual income.
- 4) On or before May 22, 2015, Employer and the division will file any rebuttal evidence to the opposing party's evidence.
- 5) The parties are ordered to contact William Wright when they are ready to schedule a prehearing with Hearing Officer Janel Wright to set a hearing date.

Dated in Anchorage, Alaska on May 6, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Janel Wright, Designated Chair

David Kester, Member

Pamela Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under 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* Supreme Electric, LLC, employer; respondent; Case No. 700004562; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on May 6, 2015.

Sertram Harris, Office Assistant II