

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CINDY LOU JENNINGS,)	
Employee,)	INTERLOCUTORY
Claimant,)	DECISION AND ORDER
)	
v.)	AWCB Case No. 200822666
)	
DOBSON COMMUNICATIONS)	AWCB Decision No. 15-0065
CORPORATION,)	
Employer,)	Filed with AWCB Anchorage, Alaska
)	on June 2, 2015
and)	
)	
NEW HAMPSHIRE INSURANCE)	
COMPANY,)	
Insurer,)	
Defendants.)	
)	

Cindy Lou Jennings' (Employee) April 16, 2015 petitions regarding her second independent medical examination (SIME) were scheduled to be heard on May 26, 2015, in Anchorage, Alaska, a date selected on May 11, 2015. Non-attorney representative Heather Johnson appeared telephonically and represented Employee. Attorney Krista Schwarting appeared and represented Dobson Communications Corporation and New Hampshire Insurance Company (Employer). There were no witnesses. Because the parties had not been properly served notice, an oral ruling continued and rescheduled the hearing. Over Employer's objection, a second oral ruling allowed the submittal of additional evidence and briefing for the rescheduled hearing. This decision examines and memorializes the two oral orders. The record closed at the hearing's conclusion on May 26, 2015.

ISSUES

Employee's representative contended the hearing should be continued because she had health issues and had not been able to prepare her brief. Prior to arguments about whether good cause existed for a continuance, the issue was rendered moot because the hearing was continued due to lack of proper notice.

1) Was the oral order to continue the hearing correct?

Employee contended she should be allowed to file and serve a hearing brief and newly obtained, relevant evidence for consideration at the rescheduled hearing. Employer contended no additional briefing or documents should be considered at the rescheduled hearing, because Employee had already missed the deadline for submittal. An oral order overruled Employer's objection.

2) Was the oral order to allow additional evidence and briefing correct?

FINDINGS OF FACT

A review of the entire record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

- 1) On December 6, 2008, Employee slipped on ice in the parking lot where she worked. The Report of Occupational Injury or Illness (ROI) indicated she hit her head, causing a "severe concussion" and bruised tailbone. (ROI, December 17, 2008.)
- 2) On April 11, 2014, Employee filed a workers' compensation claim seeking total temporary disability (TTD) benefits from October 2012 through January 2, 2013, and from January 2014 through present; total partial disability (TPD) benefits from January 13, 2013 through January 2014; medical costs; transportation costs (\$60); review of the reemployment benefits administrator's ineligibility decision, and unfair or frivolous controversion. Employee stated on December 6, 2008 she slipped on ice at work, fell on her head, and was temporarily knocked unconscious. She described the nature of her injuries as "post concussion syndrome, memory loss, widespread pain radiating throughout my body, depression, dizziness + vertigo, cognitive difficulties, and floaters in eyes." (Claim, March 21, 2014.)

- 3) On April 11, 2014, non-attorney representative Heather Johnson entered her appearance on behalf of Employee. (Entry of appearance, April 11, 2014.)
- 4) On February 26, 2015, a prehearing conference was held to discuss the parties' stipulated second independent medical evaluation (SIME). The designee set deadlines and explained the process and procedures to be followed. (Prehearing conference summary, February 26, 2015.)
- 5) Employer prepared and served on Employee a draft SIME form indicating Employee was to be evaluated by an orthopedic surgeon, neurologist, endocrinologist, and psychiatrist. (Unsigned and undated SIME form; Employer's hearing brief Exhibit 1.)
- 6) On April 13, 2015, Employee's representative filed a petition contending she disagreed with Employer's choice of SIME physician specialties. Employee petitioned for Employee "to see Dr. Ling, who specializes in neurology, psychiatry, and substance. I would also like for her to be seen at a pituitary center. Regular endocrinologists do not have much experience specifically testing the pituitary after a head trauma. Opposing counsel wants to send her to a regular endocrinologist and an orthopedic." (Petition, April 13, 2015.)
- 7) On April 13, 2015, Employee also petitioned "to have letters from former managers included in the medical records sent to the SIME for the purpose of establishing a baseline of what [Employee] was like before and after the accident. . . ." (Petition, April 13, 2015.)
- 8) On May 11, 2015, a prehearing conference scheduled a hearing for May 26, 2015 on Employee's petitions regarding "1) choosing the proper SIME physician(s) (and location - i.e. a pituitary center) and 2) what documents can be included in the SIME medical binder." The prehearing conference summary directed the parties to serve and file hearing briefs and evidence on or before May 20, 2015. The parties were notified that any request for a continuance, postponement, cancellation or change of the hearing date would be reviewed in accordance with 8 AAC 45.074. (Prehearing conference summary, May 11, 2015.)
- 9) On May 22, 2015, Employee's representative contacted the board to request the May 26, 2015 hearing be continued because she had personal health issues and had not finished her hearing brief. She stated she would be contacting the other parties that afternoon. (ICERS database phone call entry.)
- 10) At hearing, Employee's representative stated this was the first time she had appeared before the board. She indicated she has had a brain injury, suffers from severe fatigue, and has been

having major health issues for the last three months, on some days being unable to get out of bed. She stated she had done the best she could under these circumstances. (Record.)

11) Employee's representative stated she never received the May 11, 2015 prehearing conference summary, which specified the May 20, 2015 deadline to file her brief, and indicated that any request for continuance would be reviewed in accordance with 8 AAC 45.074. (Record.)

12) At hearing, the designated chair explained continuances cannot be granted absent a showing of good cause. However, prior to hearing arguments as to whether good cause existed in this case, the hearing was continued on other grounds: due to an administrative error, the board had failed to give the parties at least 10 days' notice of the hearing, either personally or by certified mail. (ICERS computer database; Record.)

13) The hearing was rescheduled for July 9, 2015. Because Employee and her representative will be driving in from the Kenai Peninsula, the designated chair stated efforts will be made to accommodate their preference for a late morning or early afternoon time slot. (Record.)

14) Employee's representative stated she had recently obtained medical evidence relevant to the instant hearing issues, which she wanted to file, along with a brief, prior to the rescheduled hearing. Employer objected, noting that Employee had missed the original deadline to submit a brief and evidence. After deliberation, the panel overruled Employer's objection. (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 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 . . .

. . . .

(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.

AS 23.30.005. Alaska Workers' Compensation Board.

...

(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

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

The Alaska Supreme Court held the board owes a duty to every claimant to fully advise him of "all the real facts" bearing upon his right to compensation, and instruct him how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963). The Court also stated the pleadings of self-represented (*pro se*) litigants should be held to less strict standards than those of lawyers. In *Gilbert v. Nina Plaza Condo Ass'n*, 64 P.3d 126, 129 (Alaska 2003), a case involving civil court discovery, the Court stated:

It is well settled that in cases involving a *pro se* litigant the superior court must relax procedural requirements to a reasonable extent. We have indicated, for example, that courts should generally hold the pleadings of *pro se* litigants to less stringent standards than those of lawyers. This is particularly true when 'lack of familiarity with the rules rather than gross neglect or lack of good faith underlies litigants' errors.' . . .

AS 23.30.110. Procedure on claims.

....

(c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

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. . . .

AS 23.30.155. Payment of compensation.

. . . .

(h) The board may upon its own initiative at any time . . . make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.

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;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

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(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(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;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues

set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance for good cause as set out in (1)(A) - (I) of this subsection.

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

(1) The affidavit of readiness is inoperative for purposes of scheduling another hearing;

(2) The board or its designee need not set a new hearing date at the time a continuance or cancellation is granted; the continuance may be indefinite; and

(3) A party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

8 AAC 45.114. Legal Memoranda.

Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must:

(1) be filed and served at least five working days before the hearing...

(2) not exceed 15 pages, excluding exhibits, unless at a prehearing the board or its designee determined that unusual and extenuating circumstances warranted a longer memorandum; if the board or its designee granted permission at prehearing to file a legal memorandum exceeding 15 pages, excluding exhibits, it must be accompanied by a one-page summary of the issues and arguments;

(3) be on 8 ½ by 11-inch paper of at least 16-pound weight, have margins of at least one inch on all sides, exclusive of headers and page numbers, and have spacing of not less than one and one-half lines, except that quotations may be single-spaced and indented;

(4) display the text in clear and legible hand printing or writing in black or blue ink or in black typeface equivalent in size to at least 12 point Courier or 13 point Times New Roman or New Century Schoolbook; . . .

8 AAC 45.120. Evidence.

. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing.

. . .

ANALYSIS

1) Was the oral order to continue the hearing correct?

Due to an administrative error, the parties were not properly served notice of the May 26, 2015 hearing as mandated by AS 23.30.110(c). To hold the hearing under these circumstances would contravene not just that statute, but also general legislative intent to afford all parties due process. AS 23.30.001(4). Therefore, the oral order to continue the hearing was correct.

Because the hearing was continued due to lack of notice, Employee's last-minute request for a continuation due to health problems was rendered moot. However the board has a duty to fully advise claimants of all facts bearing on their rights to compensation, and to instruct them how to pursue those rights. *Richard*. Employee is hereby notified that continuances are not favored by the board and will not be routinely granted. Even when the parties stipulate to a continuance, it will only be granted for good cause. The complete regulation regarding continuances and cancellations, 8 AAC 45.074, has been included in this decision for Employee's future reference.

The hearing was rescheduled for July 9, 2015. Employee and her representative live on the Kenai Peninsula and wish to appear in person. In consideration of the driving distance, every

attempt will be made to schedule the hearing for late morning or early afternoon. However, Employee is advised to contact the board on July 8, 2015 to learn the scheduled hearing time. *Id.*

2) Was the oral order to allow additional evidence and briefing correct?

Employer opposed allowing Employee to file a brief or evidence for the rescheduled hearing on the basis that Employee had already missed the original filing deadline. Employer's objection was overruled for several reasons. First, the pleadings of laypersons are held to less strict standards than those of lawyers, particularly when lack of familiarity with the rules, rather than gross neglect or lack of good faith, underlies the claimant's errors. *Gilbert*. Employee's non-attorney representative does not, and should not be expected to possess an attorney's comprehensive grasp of legal concepts and procedures. Employee's representative has never before appeared before the board. She stated she had done the best she could to follow the appropriate procedures, but she has had a brain injury and suffers from severe fatigue. Moreover, she stated she never received the May 11, 2015 prehearing conference summary, which specified the May 20, 2015 filing deadline for hearing briefs and evidence, and also indicated any request for continuance would be reviewed in accordance with 8 AAC 45.074.

Under AS 23.30.135(a), investigations, inquiries and hearings may be conducted in the manner by which the parties' rights may best be ascertained. AS 23.30.155(h) confers even broader discretion for the factfinders, on their own initiative, to take actions to properly protect the parties' rights. A review of the entire record in this case indicates that the order to allow further briefing and evidence was correct. Not to do so would violate Employee's due process rights and opportunity to have her arguments and evidence fairly considered. AS 23.001(4). It would also breach the legislative intents to provide quick, efficient, fair and predictable benefits at reasonable costs, and for process and procedure to be as summary and simple as possible. AS 23.30.001(1); AS 23.30.005(h). Moreover, there is no indication this order would cause Employer any hardship or prejudice, since it too will be afforded the opportunity to file a new brief after reviewing Employee's new evidence.

Employee is advised any documentary evidence she intends to rely on at the July 9, 2015 hearing must be filed and served on Employer by June 20, 2015. 8 AAC 45.120(f). The parties' briefs,

which should not exceed 15 pages with 1.5 line spacing, are due by July 1, 2015.
8 AAC 45.114(1,2). *Richard*.

CONCLUSIONS OF LAW

- 1) The oral order continuing the hearing was correct.
- 2) The oral order allowing additional evidence and briefing was correct.

ORDER

- 1) The May 26, 2015 hearing is continued until July 9, 2015. The hearing issues will remain the same.
- 2) The deadline to file and serve documentary evidence is June 20, 2015.
- 3) The deadline to file and serve hearing briefs is July 1, 2015.

Dated in Anchorage, Alaska on June 2, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Michael O'Connor, Member

Patricia Vollendorf, 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 CINDY LOU JENNINGS, employee / claimant; v. DOBSON COMMUNICATIONS CORP., employer; NEW HAMPSHIRE INSURANCE CO., insurer / defendants; Case No. 200822666; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 2, 2015.

Vera James, Office Assistant