

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JERRY S. PHILLIPS,)	
)	
Employee,)	
Claimant,)	
)	
v.)	
)	FINAL DECISION AND ORDER
RUSTY'S TOWING, KENNETH DIETZ,)	
K&K HOLDINGS, LLC, and GREATLAND)	AWCB Case No. 201415973
TOWING,)	
)	AWCB Decision No. 15-0091
Employers,)	
)	Filed with AWCB Anchorage, Alaska
and THE ALASKA WORKERS')	on July 28, 2015
COMPENSATION BENEFITS)	
GUARANTY FUND,)	
)	
Defendants.)	
)	

Jerry S. Phillips' (Employee) September 2, 2014 claim was heard on July 28, 2015, in Anchorage, Alaska, a date selected on June, 23, 2015. Employee, who is self-represented, did not appear. Kenneth Dietz appeared telephonically and represented himself, K&K Holdings, LLC, Rusty's Towing and Greatland Towing. (Employers). Joanne Pride appeared, Velma Thomas appeared telephonically, and both represented the Alaska Workers' Compensation Benefits Guaranty Fund (the fund). There were no witnesses. The panel unsuccessfully attempted to contact Employee at his telephone number of record, as well as at two additional telephone numbers found in the file. Employee's telephone number of record was not in service; the designated chair left voicemail messages with the other two telephone numbers. The panel waited 30 minutes and Employee did not call back. All parties present requested an order dismissing Employee's case without prejudice. The panel issued an oral order dismissing

Employee's claim without prejudice. This decision examines the oral order and provides Employee with instructions. The record closed at the hearing's conclusion on July 28, 2015.

ISSUES

Employee did not appear for the hearing. When the panel found Employee was properly served with hearing notice, the fund and Dietz contended Employee's case should be dismissed without prejudice.

As Employee did not appear at hearing, his position on this issue is not known. This decision presumes he would oppose having his case dismissed without prejudice. An oral order dismissed Employee's case without prejudice.

Was the oral order dismissing Employee's case without prejudice correct?

FINDINGS OF FACT

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

- 1) On June 23, 2015, Employee attended a hearing by telephone. At the June 23, 2015 hearing, the employers argued for a hearing continuance, which was granted. The parties at the June 23, 2015 hearing stipulated to a new hearing date on the merits of Employee's claim, set for July 28, 2015. (*Phillips v. Rusty's Towing*, AWCB Decision No. 15-0071 (June 24, 2015) (*Phillips II*).
- 2) On June 24, 2015, *Phillips II* also advised the parties a merits hearing was scheduled for July 28, 2015. (*Id.* at 3).
- 3) On June 25, 2015, the division served a hearing notice on all parties for the July 28, 2015 merits hearing. The division properly served Employee with a hearing notice at his address of record by certified mail, return receipt requested, and by regular mail. (Hearing Notice, June 25, 2015; experience, judgment and inferences drawn from the above).
- 4) Employee received actual, personal notice and certified and regular mail notice of the July 28, 2015 hearing. (*Phillips II*; Hearing Notice, June 25, 2015; experience, judgment and inferences drawn from the above).
- 5) Employee had more than 10 days' notice of the July 28, 2015 hearing. (*Id.*).

- 6) Employee's mail was not returned to the division as unclaimed or undeliverable. (ICERS database, accessed July 28, 2015).
- 7) On July 28, 2015, Employee did not appear at hearing. The designated chair attempted to contact Employee by telephone at his telephone number of record, as well as at two additional telephone numbers found in agency materials. Employee's telephone number of record was no longer in service. The designated chair left a voicemail message on the other two telephone numbers' recorders, provided a telephone number for Employee to call and asked him to call the hearing room directly and promptly. The panel waited approximately 30 minutes from the hearing start time, but Employee did not return either telephone call. (Hearing record).
- 8) The reason for Employee's absence from the hearing is unknown. (Judgment).
- 9) At hearing, the fund and Dietz requested an order dismissing Employee's case without prejudice for his failure to appear. After deliberation, the panel issued an oral order dismissing Employee's case without prejudice. (Hearing record).

PRINCIPLES OF LAW

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 23.30.110. 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 in 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. . . .

8 AAC 45.050. Pleadings. (a) A person may start a proceeding before the board by filing a written claim or petition.

(b) Claims and petitions.

(1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.

(2) A request for action by the board other than by a claim must be by a petition that meets the requirements of (8) of this subsection. The board has a form that may be used to file a petition.

(3) Parties must be designated in accordance with 8 AAC 45.170.

(4) Within 10 days after receiving a claim that is complete in accordance with this paragraph, the board or its designee will notify the employer or other person who may be an interested party that a claim has been filed. The board will give notice by serving a copy of the claim by certified mail, return receipt requested, upon the employer or other person. The board or its designee will return to the claimant, and will not serve, an incomplete claim. A claim must

(A) state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties; and

(B) be signed by the claimant or a representative. . . .

. . . .

(f) Stipulations.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts.

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

(3) Stipulations of fact or to procedures are binding upon the parties to the stipulation and have the effect of an order unless the board, for good cause, relieves a party from the terms of the stipulation. . . .

8 AAC 45.052. Medical summary. (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition.

The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

(1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination, together with the affidavit of readiness for hearing and an updated medical summary and copies of the medical reports listed on the medical summary, if required under this section.

(2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

(e) No hearing will be scheduled or held until the party filing the affidavit of readiness for hearing has complied with the provisions of this section.

8 AAC 45.060. Service. (a) The board will serve a copy of the claim by certified mail, return receipt requested, upon each party or the party's representative of record.

(b) A party shall file a document with the board, other than the annual report under AS 23.30.155 (m), either personally or by mail; the board will not accept any other form of filing. Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

(c) A party shall file proof of service with the board. Proof of service may be made by

- (1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party;
- (2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or
- (3) letter of transmittal if served by mail.

(d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if required. The board will, in its discretion, refuse to consider a document when proof of its service does not conform to the requirements of this subsection. . . .

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. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

- (1) identifying and simplifying the issues;
- (2) amending the papers filed or the filing of additional papers. . . .

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.

(b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

....

(B) On the written arguments and evidence in the board's case file regarding a claim or petition, a party must file an affidavit of readiness for hearing in accordance with (2) of this subsection requesting a hearing on the written record. If the opposing party timely files an affidavit opposing a hearing on the written record, the board or designee will schedule an in-person hearing. If the opposing party does not timely file an affidavit opposing the hearing on the written record, the board will, in its discretion, decide the claim or petition based on the written record. If the board determines additional evidence or written arguments are needed to decide a claim or petition, the board will schedule an in-person hearing or will direct the parties to file additional evidence or arguments.

....

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,

(A) action will not be taken by the board or designee on the claim or petition; and

(B) the party must file another affidavit after the time set by this paragraph.

....

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing. . . .

8 AAC 45.120. Evidence. . . .

....

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, 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. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

(g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.

(h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that

(1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible;

(2) the document is not hearsay under the Alaska Rules of Evidence; or

(3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g).

ANALYSIS

Was the oral order dismissing Employee's case without prejudice correct?

At the June 23, 2015 hearing, the parties stipulated to a merits hearing on Employee's claim on July 28, 2015. 8 AAC 45.050(f). Employee had actual, personal notice that a hearing on his claim would be held on July 28, 2015, because he was present at the June 23, 2015 hearing and participated in the stipulation setting the new hearing date. Further, *Phillips II*, issued on June 24, 2015, further provided Employee with notice of the July 28, 2015 merits hearing. Lastly, the division sent Employee a hearing notice on June 25, 2015, and mailed it to his address of record both by certified mail, return receipt requested, and by regular mail. Employee had more than 10 days' notice of his hearing. AS 23.30.110(c). There is no evidence Employee's hearing notice has been returned to the division as unclaimed or undeliverable as addressed. Therefore, Employee had sufficient notice of the July 28, 2015 hearing on his claim. *Rogers & Babler*.

Employee did not appear at the July 28, 2015 hearing. The designated chair called his telephone number of record, and found it was no longer in service. The designated chair also called two other telephone numbers Employee had used in the past, and left messages. Employee did not call the division to participate in his hearing during the subsequent 30 minutes. The reason why Employee did not participate in the hearing is not known. The fund and Dietz both contended Employee's case should be dismissed without prejudice. After deliberation, the panel issued an oral order dismissing Employee's claim without prejudice. 8 AAC 45.070(f)(2).

Hearings in workers' compensation cases are held in a manner by which all parties' rights can be best ascertained. AS 23.30.135. As the party claiming benefits, Employee's testimony may be indispensable to raise the presumption or prove the elements in his claim. There may be many reasons why Employee was unwilling or unable to participate at the July 28, 2015 hearing. Nonetheless, without an explanation for his absence from Employee, the law generally requires that scheduled hearings, especially those based on parties' stipulations, go forward as scheduled. 8 AAC 45.050(f); 8 AAC 45.070(a). Other litigants who were ready to have a hearing were not placed on the hearing docket because Employee's case was scheduled for hearing on July 28, 2015. Having found Employee was properly served with the hearing notice, the panel had discretion to: proceed with the hearing, take evidence and decide the issues, dismiss the case without prejudice, or adjourn, postpone, or continue the hearing. 8 AAC 45.070(f)(1-3). All parties present contended the second option should be selected -- dismissal without prejudice. Given the above facts, especially Employee's unexplained absence, the panel's oral order dismissing Employee's case without prejudice makes the most sense because it takes into account the fact Employee was not present for reasons unknown and places the burden on Employee to refile his claim and request another hearing when he is ready to proceed. 8 AAC 45.070(f)(2). Therefore, the oral order was correct.

Dismissal "without prejudice," does not mean Employee's case is over. It simply means if he wants to pursue his right to benefits in this case, he must file a new claim and request another hearing. Employee is advised to file another workers' compensation claim if and when he is ready and able to proceed. 8 AAC 45.050(a)(1). If he has additional medical records, Employee is directed to file and serve all medical records for work-related injury care on all parties on

medical summaries, in accordance with due process. 8 AAC 45.052; 8 AAC 45.060. After filing his claim, Employee may also request a prehearing conference. 8 AAC 45.065. If Employee has obtained all necessary discovery and thinks he is ready to proceed again to hearing, he may request a hearing by filing an affidavit of readiness for hearing. 8 AAC 45.070(b)(1). If Employee has other documentary evidence upon which he wants to rely at a future hearing, he is directed to file and serve a copy on all parties in accordance with due process. 8 AAC 45.120. If Employee has any questions concerning how to file a claim, request a prehearing conference or request another hearing, he is directed to contact a workers' compensation technician at the division's offices, for assistance.

CONCLUSION OF LAW

The oral order dismissing Employee's case without prejudice was correct.

ORDER

- 1) Employee's September 2, 2014 claim is dismissed without prejudice.
- 2) Employee is directed to file a new workers' compensation claim if and when he is ready to proceed to hearing, in accordance with the instructions set forth above.

Dated in Anchorage, Alaska, on July 28, 2015.

ALASKA WORKERS' COMPENSATION BOARD

William Soule, Designated Chair

Amy Steele, Member

Rick Traini, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Jerry S. Phillips, employee / claimant v. Kenneth Dietz; Rusty's towing; K&K Holdings, LLC,; and Greatland Towing employers; and the Alaska Workers' Compensation Benefits Guaranty Fund / defendants; Case No. 201415973; 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 July 28, 2015.

Elizabeth Pleitez, Office Assistant