ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

SHELLEY K. McCORMICK, Employee, Claimant, v. NORTHERN AIR CARGO, INC., Employer, and LIBERTY MUTUAL FIRE INSURANCE COMPANY, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200906937 AWCB Decision No. 15-0122 Filed with AWCB Anchorage, Alaska on September 24, 2015

Shelley K. McCormick's May 16, 2013 claim was scheduled for hearing on August 19, 2015 in Anchorage, Alaska. This hearing date was selected on June 11, 2015. Northern Air Cargo, Inc.'s August 18, 2015 petition for a continuance and August 13, 2015 petition for a settlement conference were heard as preliminary matters, and the hearing on Ms. McCormick's (Employee) claim was continued. Attorney Elliott Dennis appeared and represented Employee. Attorney Rebecca Holdiman Miller appeared and represented Northern Air Cargo, Inc. and Liberty Mutual Fire Insurance Company (Employer). No witnesses testified. The record closed on August 19, 2015.

ISSUES

Employer contended the hearing on Employee's claim should be continued because a witness was unexpectedly unavailable to testify at the hearing. Employee contended there have been

significant delays in her case, and continuing the hearing would further delay her receipt of benefits. After deliberations, the hearing was continued.

1. Was the decision continuing the hearing on Employee's claim correct?

Employer contended the parties should be ordered to attend a settlement conference/mediation to attempt to resolve Employee's claim. Although not opposed to mediation in general, Employee opposed mediation in this case, because it would necessitate continuing the scheduled hearing and result in further delay in a determination of Employee's claim. After deliberations, the parties were ordered to attend mediation.

2. Was the order to attend a settlement conference/mediation 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 May 16, 2009 while working as a passenger service agent for Employer, Employee experienced back spasms. (Report of Occupational Injury or Illness, May 28, 2009).
2. On May 17, 2009, Employee went to the emergency room at Providence Alaska Medical Center (PAMC) and explained she began feeling back pain while working the previous day. At the time of the visit, she was experiencing low back pain, greater on the right side, which radiated into her right leg. She was given pain medication, and restricted from work for three to seven days. (PAMC, Emergency Report, May 17, 2009).
3. A May 20, 2009 MRI showed a moderate disc protrusion at L4-5 with mass effect of the left L4 nerve, a small protrusion at L5-S1 causing displacement of the left S1 nerve, bilateral fluid collections at the L4-5 facet joints, and a desiccation of all lumbar discs. (Diagnostic Imaging of Alaska, MRI Report, May 20, 2009).
4. Employee continued to receive treatment and her work restrictions were continued (e.g. Alaska Spine Institute, Work Status Report, May 20, 2009; Professional Pain Management of Alaska, Work Status Report, August 24, 2009).
5. On December 4, 2009, Employee was seen by Brian Laycoe, M.D., for an employer's medical evaluation (EME). Dr. Laycoe stated the work injury was the substantial cause of an L4-5 disk herniation that caused a permanent aggravation of Employee's L4-5 degenerative

disc disease. He opined Employee's treatment had been reasonable, she was not medically stable, and could require a fusion surgery in the future. (Dr. Laycoe, EME Report, December 4, 2009).

6. Employee continued medical treatment, primarily with Leon Chandler, M.D., at AA Spine and Pain Clinic. (Medical Records).
7. On June 2, 2011, Employee was seen by Douglas Bald, M.D., for an EME. Dr. Bald diagnosed a lumbar strain and L4-5 disc herniation caused by the work injury as well as scoliosis and degenerative disc disease at L4-5 and L5-S1 that preexisted the work injury. He also diagnosed degenerative disc disease in her cervical spine that was unrelated to the work injury. Dr. Bald opined Employee was medically stable, and no further medical treatment was needed; he concluded that Employee had an eight percent permanent impairment, of which six percent was attributable to the work injury. He stated Employee could perform light-duty work, but would be unable to return to her job as a customer service agent. (Dr. Bald, EME Report, June 2, 2011).
8. On June 20, 2011, Employer controverted further TTD and medical benefits based on Dr. Bald's EME report. (Controversion Notice, June 16, 2011).
9. On May 16, 2013, Employee filed a claim for past and future medical benefits, interest, and attorney fees and costs. (Claim, May 16, 2013).
10. On June 10, 2013, Employer filed its answer to Employee's claim and a controversion notice, denying Employee was entitled to further benefits. (Answer and Controversion Notice, June 10, 2013).
11. On July 8, 2013, Dr. Chandler responded to written questions. He believed the May 16, 2009 work injury was the cause of Employee's L4-5 disc herniation and that the lumbar strain she suffered permanently aggravated her preexisting degenerative disc disease. He agreed that Employee may have been medically stable at the time of Dr. Bald's EME, but was not stable at the time of Dr. Chandler's responses. Dr. Chandler indicated ongoing medical treatment was necessary to promote recovery from the work injury. It is unclear who sent the written questions to Dr. Chandler. (Dr. Chandler, Responses to Written Questions, July 8, 2013; Observation).
12. Employee failed to attend a March 28, 2014 EME with Dr. Bald. On May 6, 2014, Employer filed a petition seeking an order compelling Employee to attend an EME. Employee

explained her failure to attend the EME was unintentional and the result of confusion. She stated the EME had been rescheduled several times, and was being scheduled near the time scheduled for a second independent medical evaluation (SIME). Employee agreed to attend the EME if rescheduled. (Petition, May 6, 2014; Answer, May 16, 2014).

13. On April 23, 2014, Employee was seen by Lowell Anderson, M.D. for an SIME on the issues of treatment and medical stability. Dr. Anderson diagnosed preexisting multi-level lumbar spondylosis, an L4-5 disc protrusion with mass effect on the left L4 nerve root, an L5-S1 disc bulge with nerve root encroachment, L4-5 anterolisthesis, and L4-5 and L5-S1 spinal stenosis. He stated Employee's preexisting L4-5 condition was likely permanently aggravated by the work injury. One question to Dr. Anderson asked if Employee was medically stable, and included the Alaska definition of medical stability; he responded "no." He stated that while treatment had been mostly palliative, surgical treatment/fusion might provide an improvement. (SIME Form, January 23, 2014; Dr. Anderson, SIME Report, April 23, 2004).
14. Dr. Anderson was deposed on July 22, 2014. He testified the substantial cause of Employee's need for treatment was her preexisting conditions, not the work injury. He disagreed with Drs. Laycoe and Bald that the injury caused the L4-5 disc herniation, explaining there was no objective way to verify that. He stated Employee was medically stable, and in his report when he responded to the question, he did not use the Alaska definition. (Dr. Anderson, Deposition, July 22, 2014).
15. On July 16, 2015, Dr. Chandler was deposed. When asked about medical stability, he explained that while the definition includes a lack of improvement for a period of time, there are some injuries, including back injuries, that fluctuate, so a person could be stable for a period of time but become unstable again. He explained that a person can't rupture a disc without a disruption of the facet joints – they have to tear the ligaments at the joint. That begins a progressive process, which is faster in people with severe arthritis. He stated that while Employee did not need surgery at that time, she would in the future. Dr. Chandler explained Employee's degenerative condition was a factor in her need for treatment as was the work injury. He could not say which cause was more significant, but because Employee was able to function and work before the May 2009 work injury, it was more likely than not

that the injury was the substantial cause. He recommended an MRI and an EMG (electromyogram). (Dr. Chandler, Deposition, July 16, 2015).

16. On August 12, 2015, Employer filed its witness list for the August 18, 2015 hearing indicating that Dr. Bald would testify either in person or telephonically. (Witness List, August 12, 2015).
17. On August 13, 2015, Employer filed a petition asking that the parties be ordered to attend a settlement conference/mediation. (Petition, August 13, 2015).
18. On August 18, 2015, Employer filed a petition to continue the August 19, 2015 hearing accompanied by an affidavit stating that on August 17, 2015, it had learned Dr. Bald would be unavailable for the hearing. (Petition and Affidavit, August 18, 2015).
19. At the August 19, 2015 hearing, Employee argued against mediation or a continuance. Employee did not oppose mediation, but argued she was ready to proceed with the hearing and mediation would lead to a delay in her receipt of benefits, in particular, out-of-pocket medical expenses and transportation costs, and she would face further costs for medical care during any delay. Employee opposed a continuance for the same reasons. She maintained the hearing should proceed, and, if necessary, the record could remain open to receive deposition testimony from Dr. Bald. Employee filed a breakdown of her medical costs, indicating she had paid $5,685.02 in out-of-pocket expenses, and an updated travel log documenting $3,131.91 in transportation costs. (Employee Hearing Argument; Revised Exhibits I and L).
20. At the hearing, Employer represented that if a continuance were granted and mediation were ordered, it would pay Employee's out-of-pocket medical costs and transportation costs, and it would pay for continuing pain management and the EMG recommended by Dr. Chandler. (Employer Hearing Representations).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> . . . .

> (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.
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> . . .
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> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . 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).

> **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.
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> **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.
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> **8 AAC 45.074. Continuances and cancellations**
> . . . .
> (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,
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> (1) good cause exists only when
> . . . .
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> (A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

The issue of board-ordered mediation was first addressed in *Lindeke v. Anchorage Grace Christian School*, AWCB Decision No. 11-0400 (April 18, 2011). *Lindeke* noted there was no specific statutory or regulatory provision requiring parties to submit to mediation, but the Alaska Workers Compensation Act contained broad authority for resolving disputes. The Act requires "process and procedure" to be as "summary and simple as possible," and is to be interpreted to ensure the "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to Employer. That goal and intent had not been met in *Lindeke* as the case had languished or "gone nowhere" for over six years. *Lindeke* noted that mediation is relatively quick, usually taking only one business day, very efficient because it normally resolves the entire case with very little Division resources, and fair because both parties must agree to a mediated settlement. Also, costs to the employer for a mediated settlement are likely to be significantly less than continued litigation. Consequently, *Lindeke* ordered the parties to mediate, but advised they were not required, or forced, to actually resolve this case through mediation.

Board-ordered mediation was again addressed in *Ellison v. Fairbanks Gold Mining Co.*, AWCB Decision No. 13-0026 (March 15, 2013). *Ellison* had been ongoing for over seven years without resolution, and, relying on *Lindeke*, mediation was ordered. *Ellison* noted that employers were equally entitled to a reasonable-cost resolution as employees were to medical and indemnity benefits.

Board ordered mediation was also addressed in *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 14-0140 (October 20, 2014). In *Freelong*, the case had been ongoing for over six years, and there had been four board decisions, including a decision on the merits that was on appeal to the Appeals Commission. Noting that significantly more litigation would be required before a final decision was reached by the board or Commission, the parties were ordered to attempt mediation.

ANALYSIS

1. Was the decision continuing the hearing on Employee's claim correct?

Hearings may only be continued for good cause. 8 AAC 45.074. The first listed example of good cause is when a material witness is unavailable and a deposition is not feasible. Here, Dr. Bald is Employer's EME, a material witness. Given that Employer only learned Dr. Bald would not be available two days before the hearing, a deposition was not feasible. Under 8 AAC 45.074, good cause existed to continue the hearing.

However, in some cases rather than continuing the hearing, the hearing record has been left open to allow a physician's deposition to be filed post-hearing. In this case, Dr. Bald's EME report was issued over four years ago. Since then, Dr. Chandler appears to agree with Dr. Bald that Employee was medically stable in June 2011, but he contends she is no longer stable. In his deposition, Dr. Anderson appears to disagree with Dr. Bald's conclusion that the work injury was the substantial cause of the disc herniation. Given the significant disagreements, it appeared likely that in addition to Dr. Bald's deposition, further briefing from the parties on the weight that should be accorded to the various medical opinions would be necessary. As a result, leaving the record open for Dr. Bald's deposition was unlikely to provide a quicker, more efficient, or fairer resolution than would a continuance. The hearing was properly continued because Dr. Bald was unavailable to testify.

2. Was the order to attend a settlement conference/mediation correct?

Although Employee was injured in 2009, her present claim was filed less than three years before the hearing. While there have been some delays, the case did not take unduly long to reach a hearing. Had the August 19, 2015 hearing not been continued because Dr. Bald was unavailable, Employee's arguments regarding delay would have been persuasive. But because the hearing was continued, and because Employer agreed to pay Employee's out-of-pocket medical costs, transportation costs, and pay for continued pain management until mediation, mediation may well result in a quicker, more efficient resolution with little if any further delay. The order directing the parties to attempt a mediated resolution of this case was correct. .

The parties are advised that they are not being required or forced to actually resolve the case, but only to make an attempt to settle their differences through mediation. If the parties are not able to successfully mediate the claim, either party has the right to seek further board action.

CONCLUSIONS OF LAW

1. The decision continuing the hearing on Employee's claim was correct.

2. The order to attend a settlement conference/mediation was correct.

ORDER

1. Employer's August 18, 2015 petition for a continuance is granted.
2. Employer's August 13, 2015 petition for a settlement conference/mediation is granted.
3. Employer is ordered to pay Employee $5,685.02 in out-of-pocket medical expenses and $3,131.91 in transportation costs.
4. Employer is ordered to pay for Employee's continued pain management with Dr. Chandler until mediation and to pay for the EMG testing recommended by Dr. Chandler.
5. Jurisdiction is reserved to resolve any remaining disputes.

Dated in Anchorage, Alaska on September 24, 2015.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

Stacy Allen, Member

Michael O'Connor, 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 SHELLEY K. McCORMICK, employee / claimant; v. NORTHERN AIR CARGO, INC., employer; LIBERTY MUTUAL FIRE INSURANCE COMPANY, insurer / defendants; Case No. 200906937; 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 24, 2015.

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Nenita Farmer, Office Assistant