ALASKA WORKERS' COMPENSATION BOARD

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

DANNY GILLETTE, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 201206290
ALASKA COMMUNICATIONS SYSTEMS HOLDINGS, Employer, and	)	AWCB Decision No. 15-0157 Filed with AWCB Fairbanks, Alaska on December 4, 2015
ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	

Danny Gillette's (Employee) January 21, 2015 and January 23, 2015 petitions seeking an order consolidating case 200013518 with case 201206290 were heard on September 10, 2015, in Fairbanks, Alaska. Attorney John Franich appeared and represented Employee. Attorney Foster Wallace appeared and represented Alaska Communications Systems Holdings and Alaska National Insurance (Employer). There were no witnesses. The record closed at the hearing's conclusion on September 10, 2015.

ISSUE

Employee contends his 2000 work injury claim against Employer should be consolidated with his 2012 work injury claim against Employer. He contends, as both injuries affected his neck, the injuries are similar, consolidating the cases and claims would result in a speedier remedy and one hearing on both cases could prevent inconsistent results that might result should two, separate hearings be held.

Employer contends Employee has failed to meet the requirements for case consolidation. It contends just because the same body part was injured, the injuries are not necessarily similar or closely-related. Employer contends consolidating the cases will not accord a speedier remedy, but will have the opposite result in direct violation of the legislature's mandate in AS 23.30.001(1).

Should Employee's cases 200013518 and 201206290 be consolidated?

FINDINGS OF FACT

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

1) On July 10, 2000, Employee reported having received a mild concussion while driving his company work truck. Employee alleged that on July 5, 2000, he was hit from behind by a vehicle traveling approximately 30 miles per hour. The division assigned case number 200013518 to this injury. (Report of Occupational Injury or Illness, July 10, 2000).

2) On July 6, 2000, Employee reported to the Tanana Valley Medical-Surgical Group, and saw Scott Conover, PA-C, for his work injury. PA-C Conover diagnosed a cervical strain, headache and questioned whether Employee had a mild concussion. (Conover report, July 6, 2000).

3) On September 27, 2000, Employee returned to PA-C Conover. Employee still had occasional blurred vision and recurrent numbness and tingling down the arms into his hands. PA-C Conover recommended additional evaluation before Employee considered settling his claim for this injury. (Conover report, September 27, 2000).

4) On December 22, 2000, Employee saw James Foelsch, M.D., for this injury. Dr. Foelsch diagnosed a mild concussive head injury and "flexion/extension injury to the cervical spine." (Foelsch report, December 22, 2000).

5) On April 30, 2012, Employee claims to have suffered a neck injury while getting into his truck. Employee claims he hit his head on the truck's door jamb and had neck pain. The division assigned case number 201206290 to this injury. (FROI, filed January 14, 2015).

6) On April 30, 2013, Employee filed a claim seeking continued medical treatment in case 201206290. (Workers' Compensation Claim, April 30, 2013).

7) On or about June 12, 2013, attorney Wallace entered his appearance on behalf of employer and its insurer in case 201206290. (Entry of Appearance, on or about June 12, 2013).

8) On September 13, 2013, Employee filed a petition requesting a second independent medical evaluation (SIME) in case 201206290. (Petition, September 13, 2013).

9) On September 30, 2013, at a prehearing conference in case 201206290, Employer through counsel reportedly non-opposed Employee's SIME petition. (Prehearing Conference Summary, September 30, 2013).

10) On October 3, 2013, Employer through counsel wrote the board a letter in case 201206290 objecting to the September 30, 2013 prehearing conference summary to the extent it suggested Employer did not oppose an SIME. Employer contended Employee did not petition for an SIME and Employer did not agree an SIME was appropriate at that time. (Wallace letter, October 3, 2013).

11) On February 24, 2014, attorney Franich entered his appearance on Employee's behalf in case 201206290. (Entry of Appearance, February 24, 2014).

12) On January 22, 2015, Employee filed a claim in case 200013518, requesting unspecified medical costs, a penalty, attorney's fees, costs and interest, and requesting a finding Employer made an unfair or frivolous controversion. On his claim, Employee erroneously associated this case number with the April 30, 2012 injury date. Employee's claim states he hit his head on his work truck's door jamb while wearing his hardhat. He alleged a left, "compressed neck," and chronic neck pain. (Workers' Compensation Claim, January 21, 2015).

13) On January 23, 2015, Employee filed a petition in case 200013518 (sic) seeking to consolidate "this with neck injury case, 200013518 DOI 04/30/2012." Employee's petition on page one erroneously associates the 200013518 case number with his April 30, 2012 work injury with Employer. His petition on page two correctly associates his April 30, 2012 work injury with case 201206290. (Petition, January 23, 2015).

14) Employee confused the injury dates and case numbers on his January 22, 2015 claim and his January 23, 2015 petition. (Experience, judgment, observations and inferences drawn from the above).

15) On February 10, 2015, John Wallace, entered his appearance in case 200013518 as attorney for Employer and its workers' compensation insurer. (Entry of Appearance, February 10, 2015).

16) On February 10, 2015, Employer filed an answer to Employee's petition to consolidate cases filed in case 200013518. Employer's answer suggests it understood Employee was trying to consolidate case 200013518 and case 201206290. Employer cited requirements set forth in 8 AAC 45.050(b)(5), and argued Employee had not provided an appropriate basis for his consolidation request. It further argued consolidation was premature. At the time, Employer had no records from case 200013518. Employer also noted Employee allegedly had four reported injuries between his July 5, 2000 injury and his April 30, 2012 injury, and perhaps had other, non-work-related injuries during this interim. Employer requested an order denying the petition or at least staying it until the parties could obtain additional information to determine whether consolidation was appropriate. (Answer to Petition to Consolidate Cases, February 10, 2015).

17) On February 10, 2015, Employer also answered Employee's claim denying all requested benefits. Employer raised statutory and equitable defenses. (Answer to Workers' Compensation Claim, February 10, 2015).

18) On August 28, 2015, the division served a hearing notice in case 200013518 on Employer's insurer Alaska National, Employee, his attorney John Franich and on Employer's attorney John Wallace. (Hearing Notice, August 28, 2015).

19) On September 9, 2015, Employer filed its hearing brief in case 201206290. In its brief, Employer argued Employee failed to meet the criteria set forth in the applicable regulation to "consolidate" two cases. Employer argued the July 5, 2000 injury was not similar, or closely-related to the April 30, 2012 injury. Employer further argued hearing the July 5, 2000 claim with the April 30, 2012 claim would not provide for a speedier resolution because several intervening accidents or injuries may affect the outcome. It further noted that while Alaska National insured Employer for both injuries, different insurers insured Employer in the interim when several other work injuries had occurred. Employer contended consolidating the cases would complicate rather than simplify matters. Lastly, Employer contended consolidating these two cases would contravene the legislature's intent to provide a quick, efficient, fair and predictable delivery of benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. (Hearing Brief, September 8, 2015).

20) At hearing on September 10, 2015, Employer reiterated the contentions and arguments made in its September 9, 2015 hearing brief. (Employer's hearing arguments).

21) At hearing on September 10, 2015, Employee contended his petitions to consolidate met the "three-part test" set forth in 8 AAC 45.050(b)(5). First, he contended the body parts in both work injuries were similar, as both injuries affected his neck. Next, Employee contended consolidating the cases would result in a speedier remedy, as there need be only a single hearing required. Lastly, diverging from the steps the designee must take to consolidate cases, Employee contended not consolidating the cases might result in inconsistent and unpredictable decisions. He contended, were the cases to be heard separately, a board panel in either case could point the liability finger either backwards or forwards to the other case, creating awkward, inconsistent results. Employee contended administrative economy required consolidation. (Employee's hearing arguments).

22) At hearing, both parties limited their argument to consolidation and neither specifically addressed "joinder." (Parties' hearing arguments; observations).

23) On October 7, 2015, attorney Constance Livsey entered her appearance on Employer's behalf in case 200013518. (Entry of Appearance, October 7, 2015).

24) On October 20, 2015, attorney Wallace withdrew as counsel for Employer and its insurer in case 200013518, and substituted attorney Livsey as attorney of record for Employer and its workers' compensation insurer. (Notice of Withdrawal of Counsel and Substitution of Counsel, October 19, 2015).

25) On November 9, 2015, the parties attended a prehearing conference. The designated chair advised the parties in an oral order that the board panel had denied Employee's petition to consolidate. (Prehearing Conference Summary, November 9, 2015).

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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> > (1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . subject to . . . 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 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 45.040. Parties. . . .
. . . .

(c) Any person who may have a right to relief in respect to or arising out of the same transaction or series of transactions should be joined as a party.

(d) Any person against whom a right to relief may exist should be joined as a party. . . .
. . . .

(f) Proceedings to join a person are begun by

(1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or

(2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

> (2) whether the person's presence is necessary for complete relief and due process among the parties;
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> (3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;
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> (4) whether a claim was filed against the person by the employee; and
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> (5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.
>
> (k) If claims are joined together, the board or designee will notify the parties which case number is the master case number. After claims have been joined together,
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> (1) a pleading or documentary evidence filed by a party must list the master case number first and then all the other case numbers;
>
> (2) a compensation report, controversion notice, or a notice under AS 23.30.205(f) must list only the case number assigned to the particular injury with the employer filing the report or notice;
>
> (3) documentary evidence filed for one of the joined cases will be filed in the master case and the evidence will be considered as part of the record in each of the joined cases; and
>
> (4) the original of the board's decision and order will be filed in the master case file, and a copy of the decision and order will be filed in each of the joined case files.
>
> (*l*) After the board hears the joined cases and, if appropriate, the division will separate the case files and will notify the parties. If the joined case files are separated, a pleading or documentary evidence filed thereafter by a party must list only the case number assigned to the particular injury with the employer filing the pleading or documentary evidence.

In *Groom v. State of Alaska*, 169 P.3d 626, 637, n. 23 (Alaska 2007), the Alaska Supreme Court noted: "The board's regulation concerning joinder provides little guidance about joinder of claims. It provides that when claims are joined, documentary evidence is considered part of the record in each of the joined cases. 8 AAC 45.040(k)(3)."

> **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. . . .

(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. . . .
. . . .

(5) A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case. If a single incident injures two or more employees, regardless of whether the employers are the same, two or more cases may be consolidated for the purpose of taking evidence. A party may ask for consolidation by filing a petition for consolidation and asking in writing for a prehearing, or a designee may raise the issue at a prehearing. To consolidate cases, at the prehearing the designee must

(A) determine the injuries or issues in the cases are similar or closely related;

(B) determine that hearing both cases together would provide a speedier remedy; and

(C) state on the prehearing summary that the cases are consolidated, and state which case number is the master case number.

(6) After cases have been consolidated under (5) of this subsection,

(A) a pleading or documentary evidence filed by a party must list the master case number first and then all the other consolidated case numbers;

(B) a compensation report, controversion notice, or a notice under AS 23.30.205(f) must list only the case number assigned to the particular injury with the employer filing the report or notice;

(C) documentary evidence filed for one of the consolidated cases will be filed in the master case file; the evidence is part of the record in each of the consolidated cases; and

(D) the original of the board's decision and order will be filed in the master case file, and a copy of the decision and order will be filed in each of the consolidated case files.

> (7) After the board hears the consolidated cases and, if appropriate, the division will separate the case files and will notify the parties. If the consolidated case files are separated, a pleading or documentary evidence filed thereafter by a party must list only the case number assigned to the particular injury with the employer filing the pleading or documentary evidence. . . .

ANALYSIS

Should Employee's cases 200013518 and 201206290 be consolidated?

Employee has expressly requested "consolidation." His hearing arguments were directed only toward "consolidation," not "joinder." Similarly, Employer opposed "consolidation" and its hearing brief and oral arguments addressed "consolidation" only, and did not consider claim "joinder." The regulation addressing "consolidation" upon which both parties appear to rely is clear on its face and is limited to situations where "a single incident injures two or more employees." 8 AAC 45.050(b)(5). For example, 8 AAC 45.050(b)(5) would apply in a case where a train wreck allegedly hurt 10 passengers, all of whom worked for any number of employers. In this hypothetical, train wreck scenario, another train passenger may have been an eyewitness who would testify that during the wreck, he closely observed the 10 people claiming to have been injured, and they did not appear to him to have suffered any injury whatsoever. A designee at a prehearing conference could consolidate the "cases" so evidence could be more efficiently obtained. If the designee consolidated the 10 "cases" under 8 AAC 45.050(b)(5), all parties could depose the eyewitness at the same time so there would not have to be 10 different depositions of the same witness, taken by 10 different lawyers in 10 different cases at 10 different times at 10 different locations.

The hypothetical is not what happened in this case. The consolidation regulation is not intended to apply to the situation here, where Employee claims to have injured his neck in 2000 and again in 2012 while working for the same employer, and subsequently filed a separate claim in each instance. In short, 8 AAC 45.050(b)(5) is inapplicable to this case. For these reasons, Employee's request to consolidate these two cases will be denied.

However, Employee is not left without a remedy. On its face, 8 AAC 45.040 says "parties," as well as "claims" and "cases," may all be "joined." Subsections (a) through (j) in 8 AAC 45.040 clearly refer to joining "parties," or in other words, "persons," people, companies and so forth. By contrast, (k) and (l) specifically refer to joining "claims" and "cases." The appropriate regulation applicable to Employee's situation is, therefore, 8 AAC 45.040(k). This subsection, in stark contrast to the subsections above it in the same section, states only what the designee will do when "claims are joined together." Unfortunately, unlike the subsections addressing how to determine when a "person" should be joined to a claim, §040(k) provides little guidance in respect to joining "claims" together, as the Alaska Supreme Court noted in *Groom*.

Employee's petitions were expressly directed to "consolidation" under 8 AAC 45.050(b)(5). Acting accordingly, Employer never addressed "joinder." It is likely Employee meant "joinder," but he requested "consolidation." This decision will not unilaterally "join" Employee's pending claims together, without giving Employer an opportunity to be heard on the "joinder" issue. AS 23.30.001; 23.30.135. While this decision will decline to consolidate Employee's cases for the reasons stated above, should Employee wish to have his petition considered as a petition for joinder, rather than consolidation, he should request a prehearing conference, at which the designee will schedule Employee's petition seeking consolidation for a written record hearing on his own motion. *Id*.

CONCLUSION OF LAW

Employee's cases 200013518 and 201206290 will not be consolidated.

ORDER

1) Employee's January 21, 2015 petition to consolidate in case 200013518 and his January 23, 2015 petition to consolidate in case 201206290 are denied.

2) Should Employee wish to have his petition considered as one seeking joinder, rather than consolidation, he is ordered to request a prehearing conference, at which the designee will schedule Employee's petition for a hearing on the written record, following briefing by the parties.

Dated in Fairbanks, Alaska on December 4, 2015.

ALASKA WORKERS' COMPENSATION BOARD

/s/ _____
Robert Vollmer, Designated Chair

/s/ _____
Jacob Howdeshell, 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 Danny Gillette, employee / claimant v. Alaska Communications Systems Holdings, employer; Alaska National Insurance, insurer / defendants; Case No. 201206290; 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 December 4, 2015.

/s/ _____
Jennifer Desrosiers, Office Assistant II