

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MARC MCNAB,)
)
Employee,)
Claimant,)
)
v.) INTERLOCUTORY DECISION AND
) ORDER ON RECONSIDERATION
)
MATHESON TRUCKING, INC.,) AWCB Case No. 201510838
)
Employer,) AWCB Decision No. 16-0012
and)
) Filed with AWCB Anchorage, Alaska
XL SPECIALTY INSURANCE) on February 5, 2016
COMPANY,)
)
Insurer,)
Defendants.)
)

Marc McNab's (Employee) February 3, 2016 petition for reconsideration was heard on the written record on February 4, 2016, in Anchorage, Alaska. Matheson Trucking, Inc. (Employer) did not file a response as of this decision's date. There were no witnesses. The record closed at the conclusion of the hearing on February 4, 2016.

ISSUE

Employee's February 3, 2016 petition seeks reconsideration of *McNab v. Matheson Trucking, Inc.*, AWCB Decision No. 16-0007 (January 14, 2016) (*McNab I*). Employee's petition states the grounds for reconsideration are to allow him to present additional evidence in support of his request for a second independent medical evaluation (SIME).

Employer did not file a response as of the date of this decision because it did not receive notice of the petition. It is presumed Employer opposes Employee's February 3, 2016 petition.

Should *McNab I* be reconsidered?

FINDINGS OF FACT

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

- 1) On January 5, 2016, Employee's October 23, 2015 petition for a second independent medical evaluation (SIME) was heard in Anchorage, Alaska. (Record). The only issue listed for the hearing was Employee's October 23, 2015 petition for an SIME. The prehearing conference summary setting the hearing date gives the parties deadlines for filing of briefs and evidence. (Prehearing Conference Summary, November 25, 2015).
- 2) At the January 5, 2016 hearing, Employee offered evidence purportedly relating to the condition of hemorrhoids generally, which Employee contends is related to his work for Employer. Employee stated the evidence was his own Internet research, rather than medical reports or opinions. Employee had only filed the evidence the day prior. Employer objected on grounds it had not had been served with the evidence, and had not yet reviewed it. The designated chair sustained Employer's objection, stated the evidence could still be filed but would not be relied upon at the SIME hearing. (Employer's Hearing Argument; Record).
- 3) On January 14, 2016, *McNab I* denied Employee's October 23, 2015 petition for an SIME and found the oral order sustaining Employer's objection to Employee's hearing evidence was correct. (*McNab I*).
- 4) On February 3, 2016, Employee filed an untimely petition for reconsideration of *McNab I*. Employee's petition and attached brief states:

[An attorney] told me that the internet research I presented at the January 5, 2016 hearing for an SIME was insufficient. He said "you can prove anything on the internet." It took well over a week for me to analyze and decide on my next move after getting the Board's decision to deny my request for an SIME.

My assertion that it was the labor of heavy and frequent lifting I performed for Matheson Flight Extenders is the cause of my present condition needs to come from a higher, more authoritative source(s), so I am asking for more time to present it to the Board. (Petition, February 3, 2016; Observations).

- 5) The proof of service section on Employee's February 3, 2016 petition is blank. (*Id.*; Observations).
- 6) On February 5, 2016, a board clerk telephoned Employee and requested Employee refile his petition with a completed proof of service section. (ICERS electronic database).
- 7) Employer has not filed a response to Employee's petition. (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 who are subject to the provisions of this chapter.

...

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).

AS 23.30.005. Alaska Workers' Compensation Board.

....

(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. . . .

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 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision

to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

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.

....

(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.

....

(8) Except for a petition for a self-insurance certificate or an executive officer waiver, a petition must be signed by the petitioner or representative and state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties. The petitioner must provide proof of service of the petition upon all parties. The board or its designee will return to the petitioner a petition which is not in accordance with this paragraph, and the board will not act on the petition. . . .

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

(b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

ANALYSIS

Should *McNab I* be reconsidered?

McNab I issued on January 14, 2016. Employee would have had to file a petition for reconsideration on or before January 29, 2016 for it to be timely. AS 44.62.540. Even assuming three days for delivery of the decision, Employee would have had to file a petition for reconsideration no later than February 1, 2016. Therefore, Employee's February 3, 2016 petition requesting reconsideration of *McNab I* was filed late and this alone is grounds for denying reconsideration. AS 23.30.135; 8 AAC 45.063. Notwithstanding this and the fact Employee did not serve Employer with his petition, Employee's contention he is entitled to reconsideration because he would like to file additional evidence will be addressed. AS 23.30.001; AS 23.30.005; AS 23.30.135; 8 AAC 45.050; *Rogers & Babler*.

The only issue listed for the January 5, 2016 hearing was Employee's October 23, 2015 petition for an SIME. The hearing date was selected at the November 25, 2015 prehearing conference, which also provided the parties the deadlines for filing briefs and evidence. Employee had 74 days from the date he filed his petition to prepare for hearing; he had 53 days from the date he filed his petition to obtain and file any evidence. Employee attempted to file new evidence at the January 5, 2016 hearing, and Employer's objection was sustained. *McNab I* addressed whether the oral order sustaining Employer's objection was correct, and found it was. *McNab I* at 1-2, 11. *McNab I* also explained why Internet research related to the condition of hemorrhoids generally was not relevant to whether an SIME is warranted, and advised Employee he could still file the evidence in the record and rely on it at a hearing on the merits of his claim. *Id.*

Here, Employee is seeking reconsideration of *McNab I* to file similar or substantially similar evidence. AS 23.30.135. Even if Employee was allowed to file the evidence, it is unlikely to change *McNab I*'s result because it is not medical reports or opinions tending to show a medical dispute justifying an SIME. *Id.*; *Rogers & Babler*. As stated in *McNab I*, if Employee believes his proffered evidence supports his claim that work for Employer is the substantial cause of his need for medical treatment, he may file it and serve it upon Employer. Employee has not convincingly shown why *McNab I* should be reconsidered to allow for the filing of additional evidence that was not available prior to the January 5, 2016 hearing. AS 23.30.001;

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AS 23.30.005; AS 23.30.135; AS 44.62.540. Therefore, Employee's February 3, 2016 petition will be denied and *McNab I* will not be reconsidered. *Id.*

Finally, if Employee obtains medical records demonstrating a medical dispute between his treating physician and Employer's medical examiner (EME), Employee may request an SIME under AS 23.30.130 based on newly-discovered evidence. *Id.*

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CONCLUSION OF LAW

McNab I will not be reconsidered.

ORDER

Employee's February 3, 2016 petition for reconsideration is denied.

Dated in Anchorage, Alaska on February 5, 2016.

ALASKA WORKERS' COMPENSATION BOARD

Matthew Slodowy, Designated Chair

Pam Cline, Member

Ron Nalikak, Member

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 Interlocutory Decision and Order on Reconsideration in the matter of Marc McNab, employee / claimant v. Matheson Trucking, Inc., Employer; XI Specialty Insurance Company, insurer / defendants; Case No. 201510838; 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 February 5, 2016.

Pamela Murray, Office Assistant