ALASKA WORKERS' COMPENSATION BOARD

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

DAREL M. WILLIAMS,	)	
	)	
Employee,	)	
Claimant,	)	
	)	INTERLOCUTORY
v.	)	DECISION AND ORDER
	)	
FLOWLINE ALASKA, INC.,	)	AWCB Case No. 201410923
	)	
Employer,	)	AWCB Decision No. 16-0016
	)	
and	)	Filed with AWCB Fairbanks, Alaska
	)	on March 2, 2016
LIBERTY NORTHWEST INSURANCE CORPORATION,	)	
	)	
Insurer,	)	
Defendants.	)	

Darel Williams' (Employee) January 12, 2016 petition for a continuance was heard on February 4, 2016, in Fairbanks, Alaska, a date selected on October 16, 2015. Attorney Matthew Tallerico appeared on behalf of Jason Weiner and represented Darel Williams (Employee). Attorney Martha Tansik appeared and represented Flowline Alaska, Inc. and Liberty Northwest Insurance Corporation (Employer). Member Jacob Howdeshell disclosed a potential conflict of interest, and voluntarily recused himself. The hearing proceeded with a two-member panel, a quorum under AS 23.30.005(f). There were no witnesses. After considering the parties' arguments and finding "good cause" to continue, Employee's request for a continuance was orally granted. Employer requested additional relief; it asked the Board order the evidence be maintained in the "status quo" as of February 4, 2016, to prevent Employer from being unduly prejudiced by Employee's last-minute request for a continuance. Employer's request was orally granted. This

decision examines the oral orders. This decision examines and memorializes the oral order. The record closed at the hearing's conclusion on February 4, 2016.

ISSUES

Employee contended his attorney, Jason Weiner, was unexpectedly unavailable due to a lengthy and unpredictable adoption process for three children in Poland. Employee contended his attorney was called upon by the Polish government and required to travel to Poland on December 29, 2016. Employee contended his attorney was not aware how long the adoption process would take when he was called to Poland. Employee contended his attorney met with a Polish judge upon his arrival and commenced a two-week bonding period with three children he hoped to adopt. Employee contended a Polish adoption hearing was held on January 14, 2016, during which Employee's counsel was granted permission to adopt the children, and thereafter a two week appeal period commenced and Employee's counsel had to wait in Poland for the adoption decree to be finalized and valid. After the two week waiting period, Employee contended his counsel had to wait an additional week for the adoption decree to be issued, which was necessary to obtain the children's birth certificates and Visas, mandatory documents to remove the children from Poland. Employee's counsel filed a petition to continue the February 4, 2016 hearing when he realized he would most likely be unable to attend the hearing. Employee also contended two months after he filed his affidavit of readiness for hearing (ARH), Employer had Employee evaluated by Jack Blumberg, M.D., who opined work was not the substantial cause of Employee's disability or need for medical treatment, and Dr. Blumberg's report constitutes new evidence obtained by Employer after the ARH was filed which Employer will offer at hearing, and due process requires Employee be given an opportunity to obtain rebuttal evidence.

Employer contended Employee's counsel was aware of his need to travel to Poland as early as December 16, 2015. Employer contended Employee's counsel's absence was planned after the February 4, 2016 hearing was scheduled, is not unexpected, and there is no reason Employee's counsel could not participate and represent Employee at hearing telephonically. Employer contended Employee's counsel's travel plans were not determined on February 3, 2016, and the date selected to return to Alaska was not made at the last minute or unexpectedly. Employer contended Employee's counsel made himself unavailable for the February 4, 2016 hearing.

Employer contended no "good cause" reasons for a continuance exist and Employee's request should be denied. Employer contended it had requested additional time to prepare but Employee insisted the hearing date be set for February 4, 2016; Employer therefore moved forward with discovery to comply with Employee's demands for an expedient hearing. Employer also contended despite Dr. Blumberg's report, Employee had two months to develop any necessary evidence. Employer contended the case has dragged on, it has spent money to prepare for hearing, and a continuance will cause harm to Employer.

1. **Was the oral order continuing the February 4, 2016 hearing correct?**

Employer contended Employee should not be permitted to produce additional evidence. Employer requested evidence be maintained in the "status quo" as of February 4, 2016, to prevent Employer from being unduly prejudiced by Employee's last-minute request for a continuance. Mr. Tallerico did not reply or object to Employer's request.

2. **Was the oral order maintaining evidence in the "status quo" as of February 4, 2016 correct?**

FINDINGS OF FACT

The record establishes the following relevant facts and factual conclusions by a preponderance of the evidence:

1) Employee has a pending claim for medical benefits (Workers' Compensation Claim, May 22, 2015; September 16, 2015 Prehearing Conference Summary, January 20, 2016.)

2) On April 25, 2014, Employee saw Mark Kowal, M.D., for left groin pain and hernia. Employee reported he had left groin pain for approximately two months, but did not recall any inciting event. Dr. Kowal indicated a groin and testicular ultrasound showed a left sided spermatocele and a small, left inguinal hernia. Employee wished to have the hernia repaired quickly so he could return to work by May 15, 2014. (Chart Note, Dr. Kowal, April 25, 2014.)

3) On April 28, 2014, Employee underwent laparoscopic preperitoneal left inguinal hernia repair with mesh. (Operative Report, April 28, 2014.)

4) On June 27, 2014, a report of injury was filed reporting Employee's February 21, 2014 injury to his "left front side" when "picking up a pipe to slide over a little bit." "Employee reported injury from February on 6/23/14 after surgical procedure." (Report of Occupational Injury or Illness, June 23, 2014.)

5) On November 17, 2014, Employer controverted all benefits for two asserted reasons: 1) Employee failed to report his injury to Employer within 30 days as required under AS 23.30.100; and 2) Employee did not attach the presumption of compensability as medical evidence does not support his current condition or need for treatment is due to an injury within the course and scope of his employment with Employer; and due to the highly complex medical issues involved in this claim, in order to attach the presumption of compensability, Employee must produce medical evidence supporting the contention the condition and need for medical treatment is work-related. (Controversion Notice, November 14, 2014.)

6) On November 21, 2014, Employee contacted the Alaska Workers' Compensation Division (division) to inquire about the controversion. It was explained to Employee "he would need to get a letter or chart note from his doctor stating that his hernia was work-related. Once he had that medical evidence, he would then need to send a copy to the adjuster and file a copy with our office, fill out a claim if he wanted to. EE said he would contact his doctor and call back if you had any more questions." (ICERS Database, Event, November 21, 2014.)

7) On April 23, 2015, Employee filed a workers' compensation claim for temporary total and temporary partial disability benefits, permanent partial impairment (PPI), medical and transportation costs, a finding of unfair or frivolous controversion, and attorney fees and costs. (Workers' Compensation Claim, April 22, 2015.)

8) On May 13, 2015, Employer filed an answer to Employee's claim. Employer denied time loss benefits asserting Employee failed to produce medical evidence of time loss and did not specify the period for which he sought time loss benefits. Employer denied responsibility for medical treatment costs that are not reasonable and necessary to treat a work injury or that exceed the frequency standards. Employer asserted timely, proper and complete notice of treatment, medical records, and bills had not been furnished. Employer denied responsibility for transportation costs asserting it had complete defenses to Employee's claim and a mileage log had not been filed by Employee. It denied liability for PPI benefits. Employer contended its controversion was valid based on the record and information available to Employer when it

controverted, and was neither unfair nor frivolous. Employer denied attorney fees and costs. Employer asserted six affirmative defenses. (Answer, May 13, 2015.)

9) On May 13, 2015, Employer controverted Employee's claim. (Controversion Notice, May 13, 2015.)

10) On September 11, 2015, Employee filed an affidavit of readiness for hearing (ARH). (Affidavit of Readiness for Hearing, September 11, 2015.)

11) On September 16, 2015, it was discussed at a prehearing conference that the parties had attended a prehearing on May 19, 2015, at which Employer's attorney stated she would be sending releases to Employee and had no medical records indicating Employee is disabled from work due to the reported injury. At a prehearing conference on July 15, 2015, Employer's attorney reported she had just received Employee's signed release and was collecting medical records. The parties requested a follow-up prehearing, which was held on September 16, 2015. Employee withdrew his claim for time loss benefits and filed an ARH. Employer opposed the ARH. Employer asserted a hearing should be held in abeyance until discovery was complete. The parties agreed to schedule a follow-up prehearing conference before setting a hearing date. (September 16, 2015 Prehearing Conference Summary, January 20, 2016.)

12) On September 21, 2015, Employer filed an affidavit opposing Employee's ARH. Employer asserted a hearing on the merits was "extremely" premature based on the current case status and because discovery was still in its early stages, incomplete, and still progressing. Employer stated Employee's deposition was scheduled for October 22, 2015, which was likely to lead to additional relevant evidence Employer would need to pursue. Employer was still collecting medical records and, once collected, anticipated scheduling Employee for an Employer's medical evaluation (EME). Additionally, Employer acknowledged a dispute may arise between Employee's and Employer's physicians and a second independent medical evaluation (SIME) may be required. (Affidavit of Opposition to Employee's Affidavit of Readiness for Hearing, September 21, 2015.)

13) On October 16, 2015, the parties agreed to set a February 4, 2016 hearing on Employee's claim. The parties were ordered to file all evidence by January 15, 2016. (October 16, 2015 Prehearing Conference Summary, January 20, 2016.)

14) On November 18, 2015, at Employer's request, Employee was evaluated by Jack Blumberg, M.D., general surgeon, for an EME. Dr. Blumberg asked Employee what he was doing on the injury date, February 21, 2014. Employee reportedly replied

> [H]e was helping load a fabricated piece of pipe onto a truck bed. It was a large piece of material, and was lifted onto the truck bed with a crane. As it landed on the truck bed, the crane was disengaged and Mr. Williams needed to 'nudge it a little bit' so that the flange would fit into a slot in the truck. He was holding onto the flange and pulling just a little bit, and he developed pain along his left side. He said this basically went down from mid abdomen to upper thigh. He said the pain was momentary and by the time he got down from the truck, the pain was gone. He said, 'I had no discomfort at all.' About a week later, he first began to notice some left testicular pain.

Dr. Blumberg found Employee had a satisfactory left indirect inguinal hernia repair. However, Dr. Blumberg found no objective evidence to support the diagnosis of hernia until the ultrasound revealed it. Employee's description of transitory pain on his left side, not necessarily in the inguinal area, which resolved completely within moments of the accident were in Dr. Blumberg's opinion testicular pain. When the testicular pain was evaluated by ultrasound a very small hernia was found. Dr. Bloomberg indicated the activities described by Employee represent a "non-injury." Dr. Blumberg did not think there was a significant work injury or that the alleged injury was the substantial cause of the hernia and resultant surgery. Dr. Blumberg found Employee had a congenital defect. His processus vaginalis had failed to close, and this was a pre-existing condition that allowed the hernia to develop. Dr. Blumberg determined the repair of Employee's hernia was medically reasonable and necessary, but not related to his described, February 21, 2014 work activities. Dr. Bloomberg recommended no further treatment and stated "there is no permanent impairment in this case." (EME Report, Dr. Blumberg, November 18, 2015.)

15) On November 27, 2015, Dr. Blumberg's November 18, 2015 EME report was filed and mailed to Mr. Weiner. (Medical Summary, November 24, 2015.)

16) On December 1, 2015, Employee filed a request for cross-examination of Dr. Blumberg. (Request for Cross-Examination, December 1, 2015.)

17) On January 12, 2016, Employee filed a petition to continue the February 4, 2016 hearing. Employee gave four reasons the hearing should be continued: 1) the ARH was filed in September, before Employee was sent for an EME in November; 2) Dr. Blumberg's deposition is

to be on January 21, 2016; 3) Employee is waiting for a response from his current treating physician and for further medical records regarding his hernia; and 4) Employee's counsel, Jason Wiener, will be out of the country in Poland adopting three children and is not expected to be back in the country before February 6, 2016. (Petition, January 12, 2016.)

18) On January 15, 2016, issues for the February 4, 2016 hearing were framed. Employee seeks medical and transportation benefits, a finding of unfair controversion for Employer's May 13, 2015 controversion contending untimely written notice to Employer under AS 23.30.100(a), penalty and interest, and attorney fees and costs. The board designee noted Employee's claim did not assert penalty and interest and these were not included as issues for the February 4, 2016 hearing. Employee also requested a continuance to which Employer objected. The board designee did not make a determination regarding Employee's request for a continuance, and identified Employee's petition for a continuance as an issue for the February 4, 2016 hearing. (January 15, 2016 Prehearing Conference Summary, January 20, 2016.)

19) On January 18, 2016, Sylvia McCormick, PA-C, reviewed Employee's medical chart and summarized it as follows:

> 01/29/14: Mr. Williams reported left testicular pain present for six weeks without recollection of trauma. Physical exam was normal at that time. Patient was asymptomatic on that day.
>
> 02/10/14: Mr. Williams reported intermittent pain in the left testicle, again no recollection of injury or trauma was reported at that time.
>
> 02/25/14: A scrotal ultrasound was remarkable for a left sided inguinal hernia.
>
> 04/23/14: Patient reported progressive left testicular pain without known trauma except for exacerbation of symptoms was strenuous lifting at work.
>
> 05/20/14: Patient underwent left inguinal hernia repair by Dr. Kowal.

PA-C McCormick stated she was uncertain if Employee reported his left testicular pain to his Employer in January when his symptoms first began, and without an injury report, it was difficult for her to correlate the symptoms' onset to work related activities. PA-C McCormick was uncertain if Dr. Kowal linked Employee's left inguinal hernia to his work duties. She was unable to determine whether the left inguinal hernia was directly caused by Employee's work activities, but stated his symptoms were definitely exacerbated by heavy lifting while at work "as

reported on office evaluation of 04/23/14." (Addendum, Letter Response: Gazewood & Weiner 01/06/16, January 18, 2016.)

20) On January 21, 2016, Employer filed Dr. Blumberg's January 18, 2016 deposition transcript. (Videotaped Deposition of Jack Bloomberg, M.D., January 18, 2016.)

21) On January 27, 2016, Employee filed a petition for an SIME. Employee described a medical dispute between Dr. Blumberg, who opined Employee's hernia was not work related, and Employee's treating physician, PA-C McCormick, who stated Employee was engaging in strenuous activity that could have caused his hernia to be symptomatic. (Petition, January 27, 2016.)

22) On January 27, 2016, Employer opposed Employee's petition for continuance. Employer asserted Employee "insisted on setting the date for hearing as early as possible" during the October 16, 2015 prehearing. Employer contended there have been "no surprises" in Employee's claim because on several occasions Employer outlined its anticipated litigation steps. Employer noted Employee filed his ARH, which indicated he had completed discovery and was prepared to prove his claim by a preponderance of the evidence. Employer asserted it requested additional time to prepare but Employee insisted the hearing be set for February 4, 2016, and Employer therefore moved forward with discovery "to comply with Employee's demands for an expedient hearing." Employer asserted Mr. Weiner "now finds the date set months ago inconvenient and asserts that he is ill prepared. Beginning in mid-December 2015, Employee's counsel began to mention in emails to Burr, Pease & Kurtz that he anticipated being out of town for five weeks starting in January of 2016." Employer provided an exhibit in support of this contention. In another case involving an attorney from Ms. Tansik's firm and Mr. Weiner, a calendaring error had been made and the deposition of a physician had to be rescheduled. On December 16, 2015, Mr. Weiner wrote to attorney Nora Barlow, "Okay. We can reschedule. Set it for January 29. I might be out of town at that time as I am trying to adopt children and would have to be out of the country for five weeks, hopefully sometime in January, so I would expect the same courtesy if that date needs to change." Employer asserted Employee's counsel knew for some time he may have to leave the country and his planned absence after the hearing was scheduled was not unexpected. Employer asserted because Mr. Weiner participated in pre-hearings and a deposition in this case telephonically from overseas there was no reason the hearing should be continued due to Mr. Weiner's "planned

absence." Employer asserted Employee had "more than sufficient time" to obtain rebuttal evidence because Employer informed Employee in its September 21, 2015 opposition to Employee's ARH it planned to seek an EME; the EME was scheduled in October 2015, and Employee had the report since November 2015. Employer asserted a continuance should not be granted so Employee can continue developing evidence for hearing. Employer contended Employee had two months to develop his medical evidence, which was sufficient time to obtain medical evidence to rebut Dr. Blumberg's report and deposition testimony. (Employer's Opposition to Employee's Petition for Continuance, January 27, 2016.)

23) At hearing, Ms. Tansik presented January 16, 2016 email between Mr. Weiner and Ms. Barlow that indicated Mr. Weiner originally intended to return to Alaska in January, but due to a series of events in the adoption of three children in Poland, his original January return was delayed. This email confirmed Mr. Weiner was unaware until he was in the midst of the adoption process that he would be unable to return to Alaska in January as he originally intended. (Email between Jason Weiner and Nora Barlow, January 16, 2016.)

24) Matthew Tallerico is an associate attorney with Gazewood & Weiner. He does not have experience with workers' compensation laws in Alaska and does not represent workers' compensation claimants in his law practice. Mr. Tallerico stated he does "not do workers' compensation," he does "not know how it works," and he does "not even dabble in it." Although not a witness, Mr. Tallerico's description of his lack of experience and exposure to workers' compensation law is credible. (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;
> >
> > (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute.
> >
> > . . . .

> (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) 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 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) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing. An opposing party shall have 10 days after the hearing request is filed to file a response. If a party opposes the hearing request, the board or a board designee shall within 30 days of the filing of the opposition conduct a pre-hearing conference and set a hearing date. If opposition is not filed, a hearing shall be scheduled no later than 60 days after the receipt of the hearing request. 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. After completion of the hearing the board shall close the hearing record. If a settlement agreement is reached by the parties less than 14 days before the hearing, the parties shall appear at the time of the scheduled hearing to state the terms of the settlement agreement. Within 30 days after the hearing record closes, the board shall file its decision. If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.

. . . .

(h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for

> hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board's notice to the employee of the board's granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.
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> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.
>
> **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. . . .

Simpson v. State of Alaska, AWCB Decision No. 09-0064 (April 6, 2009), granted an employer's request to keep the case's procedural posture at "status quo" when the employee's non-attorney representative sought and obtained a continuance stating he was sick and not available to assist the employee at hearing. *Simpson* granted the request because the employer successfully argued it had already presented and served all of its evidence and briefing, thus essentially "showing its hand" and giving the employee additional time to prepare and potentially rebut its evidence following the continuance. The employee had filed no witness list or briefing. *See also Polya v. State of Alaska*, AWCB Decision No. 11-0058 (May 10, 2011).

> **AS 23.30.155. Payment of compensation**.
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> . . . .
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> (h) The board may upon its own initiative at any time in a case in which . . . right to compensation is controverted . . . make the investigations . . . and take the further action which it considers will properly protect the rights of all parties.

Under AS 23.30.135(a) and AS 23.30.155(h) the board has the responsibility to ascertain the parties' rights in administering and adjudicating claims under the Alaska Workers' Compensation Act (Act). Additionally, *Bohlmann v. Alaska Construction and Engineering, Inc*., 205 P.3d 316

(Alaska 2009), elaborated on the board's long-standing duty to inform unrepresented workers how to pursue their right to compensation:

> In *Richard v. Fireman's Fund Insurance Co.* (citation omitted) we held that the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation. . . . Here, the board at a minimum should have informed Bohlmann how to preserve his claim or specifically how to evaluate the accuracy of AC&E's representation that the claim was time barred. Its failure to recognize that it had to do so in this case was an abuse of discretion.

Id. at 319-20. *Bohlmann* restated the Alaska Supreme Court's requirement which stated the board owes to every applicant for compensation a duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him how to pursue that right under the law.

> **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:
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> . . . .
>
> (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.

(C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing. . . .
. . . .

(c) To oppose a hearing, a party must file an affidavit of opposition in accordance with this subsection. If an affidavit of opposition to a hearing on a claim for compensation or medical benefits is filed in accordance with this subsection, the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties. If the affidavit of opposition is not in accordance with this subsection, and unless the parties stipulate to the contrary, the board or its designee will schedule a hearing within 60 days, and will exercise discretion in holding a prehearing conference before scheduling a hearing. An affidavit of opposition that is filed under this subsection must

(1) be filed with the board's office nearest the requested hearing location;

(2) be filed within 10 days after the filing of the affidavit of readiness for hearing that is being opposed;

(3) have proof of service upon the other parties;

(4) list the parties' names and the date of the affidavit of readiness for hearing that is being opposed; and

(5) state the specific reason, and not a general allegation, that the case should not be heard, that a party is not ready, or why a hearing is not appropriate.
. . . .

(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 45.065. Prehearings.

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

. . . .

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

. . . .

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

In *Low v. Phoenix Seafoods*, AWCB Decision No. 93-0062, Employee's petition for a continuance was denied. Employee's petition asserted a continuance was proper under 8 AAC 45.074(b)(l)(D) because Employee was unexpectedly absent from the hearing venue and unavailable to participate telephonically. Employee was attending college out of state and believed the time necessary to fly to Alaska, participate in his hearing, and fly back would jeopardize his schooling. Employee telephonically participated in a December 17, 1992 prehearing conference at which the parties agreed a hearing date would be set at the next conference. It was inferred from Employee's telephonic participate that he was already absent from the state and knew of his plans to be absent due to college attendance in the spring semester. At the next prehearing conference on February 2, 1993, the hearing was scheduled and the employee was already absent from the state and planned to be absent at college throughout the spring semester. It was determined "an absence which begins before the scheduling of a hearing, or a planned absence occurring after the scheduling, is not 'unexpected.'" *Id.* at 3. Continuances are permitted where "irreparable harm" would otherwise result. It was found in the absence of any evidence the employee's presence in person was critical to fairly hearing his claim, requiring him to participate by telephone would not cause him irreparable harm. *Id.* at 4.

ANALYSIS

Was the oral order continuing the February 4, 2016 hearing correct?

The overall legislative goal in the Act is to ensure, among other things, "fair" delivery of workers' compensation benefits to injured workers at a reasonable cost to employers, if the worker is entitled to benefits. Cases must generally be decided on their merits, hearings must be fair to all parties, all parties must be afforded due process, an opportunity to be heard, and for their arguments and evidence to be fairly considered. AS 23.30.001. Administrative process and procedure under the Act must be as summary and simple as possible and claims may be investigated and hearings or inquiries conducted in the manner by which the parties' rights may be best ascertained. Action may be taken in decisions and orders to properly protect all parties' rights. AS 23.30.135(a).

Employee requested a continuance because his attorney was not available to represent him on February 4, 2016. Continuance may be granted at the board's discretion only if the party requesting the continuance shows "good cause." 8 AAC 45.070(f) provides several "good cause" examples sufficient to support a party's continuance request. "Good cause" includes: a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically; and irreparable harm will result from a failure to grant a continuance. A decision to either go forward or continue the February 4, 2016 hearing had to be made; the decision was to continue the hearing.

Employee is represented by Jason Weiner, who on February 4, 2016, was on a plane traveling from Poland to Alaska with three Polish children whom a Polish tribunal had recently decreed Mr. Weiner could adopt. As of December 16, 2015, Mr. Weiner's itinerary and adoption schedule had not been finalized. In an email message to Nora Barlow, an associate of Employer's attorney Ms. Tansik, Mr. Weiner agreed in an unrelated case to reschedule a deposition to take place on January 29, 2016. He let Ms. Barlow know he may be out of town on January 29, 2016, because he was trying to adopt children and would have to be out of the country for five weeks, "hopefully some time [sic] in January." Mr. Weiner's message to Ms. Barlow indicates that as of December 16, 2016, Mr. Weiner's plans and the proceedings to adopt

three children from Poland had not yet been determined or finalized. On December 16, 2015, Mr. Weiner could not state with certainty he would or would not be in Alaska on January 29, 2016; however, he suspected he might, otherwise he would not have agreed to reschedule a deposition for that date. Thus, this matter can be distinguished from *Low v. Phoenix Seafoods*. In *Low*, the employee knew when the hearing was scheduled he would be absent from the hearing venue attending school. Unlike in *Low*, Mr. Weiner had embarked upon the adoption of three children from a foreign country with the assistance of an adoption agency and was not informed of the final adoption procedures until sometime after December 16, 2015, long after the October 16, 2015 prehearing when the February 4, 2016 hearing date was selected. On February 4, 2016, Mr. Weiner and his newly adopted children were traveling via airplane from Poland to Alaska. Mr. Weiner was without phone service during the flight. A preponderance of the evidence shows Employee's representative was unexpectedly absent from the hearing venue and could not participate telephonically. 8 AAC 45.074(b)(1)(D). Employee has met his burden of showing "good cause" for a hearing continuance.

Good cause also exists where, despite a party's due diligence, irreparable harm may result from failure to grant the requested continuance. 8 AAC 45.074(b)(1)(N). On Employee's representative's behalf, Matthew Tallerico appeared at the February 4, 2016 hearing. Mr. Tallerico credibly stated he has "never even dabbled" in workers' compensation law. He was not familiar with Employee's case or the applicable laws. Mr. Tallerico's lack of knowledge and experience with the Act is a barrier to Employee's opportunity to be heard. Continuing the hearing to permit Employee to be represented by his attorney of record will ultimately ensure the quick, efficient, fair, and predictable delivery of medical benefits to Employee, if he is entitled to them, at a reasonable cost to Employer. It will prevent the need for reconsideration or modification based upon unintentional errors committed by Mr. Tallerico. Irreparable harm may result from a failure to grant the requested continuance because Mr. Tallerico, an attorney unfamiliar with the facts of Employee's case or the applicable workers' compensation laws, would be forced to represent Employee; hence good cause exists to continue. 8 AAC 45.074(b)(1)(N).

Continuing Employee's February 4, 2016 hearing will afford all parties due process, an opportunity to be heard, and for their arguments and evidence to be fairly considered. This practice will ensure process and procedure under the Act will be as summary and simple as possible. Lastly, it will enable the panel to best ascertain and protect all parties' rights. Accordingly, the February 4, 2016 oral continuance order was correct.

Employee's September 11, 2015 ARH is inoperative for purposes of scheduling another hearing. AS 23.30.110(c), (h); 8 AAC 45.074(c)(1). In conformance with *Richard* and *Bohlmann*, though either party may request and obtain a hearing date, Employee is advised he must take affirmative action if he wants to reschedule his May 22, 2015 claim for hearing by filing an ARH to make the request. AS 23.30.110(c); 8 AAC 45.074(c)(3). He is further advised the two-year period prescribed in AS 23.30.110(c) "continues to run again" from the date of the oral order granting Employee's continuance request, February 4, 2016. AS 23.30.110(h). As the February 4, 2016 hearing is in "continued" status, no decision on the merits of Employee's May 22, 2015 claim will be issued unless and until the matter is rescheduled.

2. Was the oral order maintaining evidence in the "status quo" as of February 4, 2016 correct?

Employer requested an order the evidence be maintained in the "status quo" as of February 4, 2016, to prevent Employer from being unduly prejudiced by Employee's last-minute request for a continuance. Employer seeks an order restricting Employee from taking unfair advantage of the continuance and trying to cure any gaps in the evidence. Because Employee's attorney of record was unexpectedly unavailable, and Mr. Tallerico, who appeared on Mr. Weiner's behalf, is unfamiliar with the Act, and Employer's request was not identified as a hearing issue, considering Employer's request to maintain evidence in the status quo *sua sponte* was incorrect.

At the January 15, 2016 prehearing, issues for hearing were framed. Employee's request for a continuance was included as a February 4, 2016 hearing issue because Employer objected to a continuance. At hearing Employer requested additional relief that the evidence be maintained in

the "status quo" as of February 4, 2016. This was not an issue identified for hearing, although it could have been. 8 AAC 45.065.

Employee's due process would be violated if not given an opportunity to respond to Employer's request. To provide both parties a due process opportunity to be heard on Employer's verbal request, before a determination is made regarding whether the evidence will be maintained in the "status quo" as of February 4, 2016, both parties will be directed to file a brief stating their respective positions on Employer's request and assertion it will be unduly prejudiced by Employee's last minute continuance. Upon receipt of the parties' briefs, Employer's request will be determined on the written record.

CONCLUSIONS OF LAW

The oral order continuing the February 4, 2016 hearing was correct.

ORDER

1) The February 4, 2016 oral order to continue is confirmed and memorialized.
2) Employee's September 11, 2015 ARH is inoperative for purposes of scheduling another hearing. If Employee wishes to reschedule the February 4, 2016 hearing, and comply with AS 23.30.110(c), he must timely file an ARH.
3) Both parties are directed to file briefs by the close of business on Friday, March 11, 2016, stating their respective positions on Employer's request for an order the evidence be maintained in the "status quo" as of February 4, 2016, to prevent Employer from being unduly prejudiced by Employee's last-minute request for a continuance.
4) Employer's request for an order the evidence be maintained in the "status quo" as of February 4, 2016 shall be heard on the written record. Upon receipt of the parties' briefs a written record hearing date will be scheduled.
5) Assuming both panelists are available if and when this matter is rescheduled, the hearing panel for any hearing in this case on the issues scheduled to be heard on February 4, 2016, shall be Designated Chair Janel Wright and Board Member Sarah Lefebvre.

Dated in Fairbanks, Alaska on March 2, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/____
Janel Wright, Designated Chair

/s/____
Sarah Lefebvre, 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 Darel M. Williams, employee / claimant v. Flowline Alaska, Inc., employer; Liberty Northwest Insurance Corp., insurer / defendants; Case No. 201410923; 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 March 2, 2016.

/s/____
Jennifer Desrosiers, Office Assistant II