

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JIN WOO LEE,

Claimant,

v.

LUIGI'S PIZZA and THE ALASKA
WORKERS' COMPENSATION BENEFIT
GUARANTY FUND,

Defendants.

)
) INTERLOCUTORY
) DECISION AND ORDER
)
) AWCB Case No. 201513345
)
) AWCB Decision No. 16-0020
)
) Filed with AWCB Anchorage, Alaska
) on March 15, 2016
)
)

Luigi's Pizza's (Luigi's) February 22, 2016 Petition for Continuance was heard on March 2, 2016 in Anchorage, Alaska. This hearing date was selected on December 9, 2015 to address the claimant's employment status at the time of injury. Attorney Christopher Beltzer appeared and represented Jin Woo Lee (Claimant). Attorney Darryl Jones appeared and represented Luigi's. Administrator Velma Thomas appeared telephonically and represented the Alaska Workers' Compensation Benefit Guaranty Fund (Fund). No witnesses appeared. After considering the parties' arguments, the board orally granted the request for continuance. This decision examines and memorializes the oral order. The record was not closed.

ISSUE

The parties agreed the hearing should be continued because none had completed discovery or was prepared to proceed. Luigi's contended its counsel had undergone knee surgery on December 1, 2015, the recovery process put him behind schedule by four to five weeks, and thus good cause for a continuance existed under 8 AAC 45.074(b)(1)(C). Claimant agreed with Luigi's request to continue the hearing, but was unable to cite a regulatory justification for doing

so. The Fund requested a continuance on due process grounds because it had not been properly served notice of the hearing.

Was the oral order continuing the March 2, 2016 hearing correct?

FINDINGS OF FACT

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

- 1) On August 17, 2015, Claimant filed two Workers' Compensation Claims (claims) indicating that on March 19, 2015, he had slipped while lifting a dough bowl from a mixer, causing the heavy bowl to hit his left foot, fracturing it. The claims differed only in that one sought payment of unspecified benefits by Luigi's, and the other by the Fund. (Claims, July 31, 2015.)
- 2) On August 26, 2015, Javed Raja, who identified himself as the owner of Luigi's, wrote the Alaska Workers' Compensation Board (board) stating he had never employed Claimant, has no employees, and operates his business on his own. (Letter, August 26, 2015.)
- 3) On August 26, 2015, the Fund answered the July 31, 2015 claim, stating that while it appeared Luigi's Pizza did not have workers' compensation insurance, it was unclear whether Claimant was employed by Luigi's and therefore had a duly authorized claim under the Alaska Workers' Compensation Act (Act). (Answer, August 26, 2015.)
- 4) On September 9, 2015, Claimant consulted with physician Chuc B. Dang, M.D., for left foot pain. Dr. Dang noted Claimant had a Lisfranc fracture that had been twice treated with implanted hardware, which was again pulling out, causing foot pain and elevating the skin. This was the only medical record in Claimant's agency file at the time of hearing. (Dang chart note, September 9, 2015; observation.)
- 5) At the first prehearing conference in this case, on September 10, 2015, Claimant orally amended his claims to request Temporary Total Disability (TTD), Permanent Partial Impairment (PPI), medical costs, and transportation costs. (Prehearing Conference Summary, September 10, 2015.)
- 6) At a prehearing conference on October 13, 2015, Claimant stated his medical bills were being paid through Medi-Cal (Prospect Insurance). Claimant had told Prospect that his injury was work-related. (Prehearing Conference Summary, October 13, 2015.)

- 7) On November 12, 2015, Attorney Christopher Beltzer filed an Entry of Appearance for the Claimant and an Affidavit of Readiness for Hearing (ARH) on the claims filed August 17, 2015. Attorney Beltzer swore he had completed necessary discovery, obtained necessary evidence, and was fully prepared for hearing. (Entry of Appearance and ARH, November 12, 2015.)
- 8) On November 23, 2015, the Fund, through claims adjuster Joanne Pride, opposed the ARH on the grounds the Fund needed time to conduct discovery and was still obtaining medical records, and an EME might also be required once medical records were received. (Affidavit in Opposition, November 23, 2015.)
- 9) On December 8, 2015, Attorney Darryl Jones filed an Entry of Appearance for Luigi's and requested continuance of a December 9, 2015 prehearing conference due to recovery from knee surgery. (Entry of Appearance and email, December 8, 2015.)
- 10) On December 9, 2015, the prehearing conference was held as scheduled. Both attorneys attended telephonically. Other attendees included Mr. Jones's paralegal and adjuster Pride. The board designee set an oral hearing for March 2, 2016. The parties agreed to bifurcate the issues and first hear just the issue of whether Claimant was an "employee" or an "independent contractor" for the purposes of his claims. The parties were informed that any requests for continuance, postponement, cancellation, or change of the hearing date would be reviewed under 8 AAC 45.074. (Prehearing conference summary, December 9, 2015.)
- 11) On February 1, 2016, notice of the March 2, 2016 hearing was served on Claimant, both attorneys and the adjuster. The Fund Administrator was not served. (Hearing notice, February 1, 2016; observation.)
- 12) On February 10, 2016, Claimant filed the business license for Luigi's Pizza and police reports from an assault incident that occurred near the business on March 12, 2015. No other evidence has been filed since the December 9, 2015 prehearing conference. (Affidavit of Filing, February 10, 2015.)
- 13) On February 22, 2016, Luigi's requested to continue the hearing, stating that its attorney had not yet received pertinent audio and video discovery, had a scheduling conflict with software training that could not be rescheduled, and had back-to-back conflicting trials that could not be rescheduled. Luigi's stated that the request was "non-opposed" by "attorney of record." (Motion to Continue and Affidavit of Counsel, February 22, 2016.)

14) On February 26, 2016, Luigi's filed a stipulation to continue the oral hearing to late May 2016, signed by the attorneys for Luigi's and Claimant, but not by the Fund. (Stipulation, February 26, 2016.)

15) At hearing on March 2, 2016, Luigi's stated good cause for continuance existed under 8 AAC 45.074(b)(1)(C). Luigi's attorney had knee surgery on December 1, 2015. He stated his judgment was not impaired in any way at the December 9, 2015 prehearing conference at which the hearing was scheduled, but subsequently he had been unable to adequately keep up with discovery. Claimant stated that further discovery was needed due to difficulty obtaining bank records and that neither he nor attorney Beltzer was prepared to have a meaningful hearing. (Record.)

16) At hearing Claimant's attorney stated he agreed more records might be helpful and he accepted the proposed continuance. Claimant's attorney stated that although he filed the ARH leading to the hearing, discovery had not progressed as expected. Attorney Beltzer said he didn't know whether Claimant was working or currently receiving medical treatment for his injury, but that continuance was in Claimant's best interests. (Record.)

17) At hearing the Administrator stated she had not received notice of the hearing, and did not know about it until receiving the stipulation to continue, a few days prior to the hearing. Administrator Thomas stated the claims adjuster was served, but she had not informed the Administrator of the hearing. Adjuster Pride was not present at the hearing. The Fund was not prepared to hold the hearing and agreed to a continuance. (Record; observation.)

18) At hearing the factfinders issued an oral order granting the continuance based on the Fund's lack of notice and resulting due process concerns. The panel expressed concern that Claimant may not be well served by the continuance. (Record.)

19) The parties agreed to schedule a new hearing for April 28, 2016, on the same issue. Parties agreed to submit all evidence 20 days prior to hearing, and briefs five working days prior to hearing, in accordance with regulations. The parties were also advised of their continuing duty under AS 23.30.095(h) to timely file medical records throughout the pendency of the proceeding. (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 23.30.095. Medical treatments, services, and examinations.

....

- (h) Upon the filing with the division by a party in interest of a claim or other pleading, all parties to the proceeding must immediately, or in any event within five days after service of the pleading, send to the division the original signed reports of all physicians relating to the proceedings that they may have in their possession or under their control, and copies of the reports shall be served by the party immediately on any adverse party. There is a continuing duty on all parties to file and serve all the reports during the pendency of the proceeding.

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. . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .

AS 23.30.135. Procedure before the board.

(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided 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 23.30.155. Payment of compensation.

. . . .

(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 Act.

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. . . .

8 AAC 45.074. Continuances and cancellations.

(a) A party may request the continuance or cancellation of a hearing by filing a

(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

(C) a party, a representative of a party, or a material witness becomes ill

or dies;

....

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

In *Day v. Anchorage School District*, AWCB Decision No. 04-0118 (May 20, 2004), a continuance was granted for good cause under 8 AAC 45.074(b)(1)(C) because the employee was hospitalized for an unknown duration. In *Chung v. Tundra Restaurant*, AWCB Decision No. 07-0057 (March 16, 2007), the board ordered a continuance because the unrepresented employer was in the hospital following cardiac surgery. In *Simpson v. State of Alaska*, AWCB Decision No. 09-0064 (April 7, 2009), the board found good cause to continue due to the employee's non-attorney representative's claim that he was ill, and found that the employee might suffer irreparable harm if a hearing were to go forward without the representative present. In *Wariner v. Chugach Support Services, Inc.*, AWCB Decision No. 12-0161 (September 12, 2012), good cause to continue was found when the employee's wife, who had also acted as the employee's non-attorney representative, suffered from terminal cancer and died three days prior to hearing.

ANALYSIS

Was the oral order continuing the March 2, 2016 hearing correct?

The Act's overall legislative intent is to ensure, among other things, fair delivery of workers' compensation benefits to entitled injured workers at a reasonable cost to the employer. Cases must generally be decided on their merits, hearings must be fair to all parties, and all parties must be afforded due process, an opportunity to be heard, and fair consideration of their arguments and evidence. AS 23.30.001. Administrative 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. AS 23.30.005(h); AS 23.30.135(a). Continuances are not favored by the board, and are not routinely granted. A continuance may be granted upon stipulation by all parties only if evidence is provided showing good cause to continue the proceedings. 8 AAC 45.074(b). 8 AAC 45.074(b)(1) delineates the limited circumstances that can constitute good cause.

Luigi's requested a continuance under 8 AAC 45.074(b)(1)(C) based on an alleged lack of sufficient time to adequately present his case due to its attorney's December 1, 2015 knee surgery, three months prior to the hearing date. Paragraph (C) states that good cause exists when "a party, a representative of a party, or a material witness becomes ill or dies." Claimant could point to no good cause within the bounds of 8 AAC 45.074(b)(1) to support his stipulation to Luigi's request to continue. Claimant instead claimed good cause existed due to general goals of moving the case forward and obtaining more discovery. The Fund stated it had not received proper notice of the hearing, because notice had only gone to the Fund's claims adjuster. In essence the Fund argued it had been surprised by the hearing and hadn't had sufficient time to prepare.

The arguments made by Luigi's and Claimant are not well taken. Agreement of the parties is not sufficient to continue a hearing; good cause is required. Paragraph (C) appears to contemplate a situation in which the illness or death of a party, representative, or material witness is sufficiently close in time to the hearing to affect the person's ability to attend or present his case. Here, Luigi's attorney had surgery three months prior to the hearing date, participated shortly following the surgery in the prehearing conference that set the hearing date, stated his representation had not been impaired in any way at that conference, and pointed to a workload overrun and resulting lack of sufficient discovery and preparation for the hearing. Attorney Jones did not cite any legal authority to support his request, and the factfinders are not aware of any prior interpretations of paragraph (C) that would indicate it is appropriate in these circumstances. The illness at issue here was not sufficiently related in time or extent to the ability of Luigi's attorney to seek discovery and present his case to be considered good cause.

Claimant's support for the continuance also lacks good cause under 8 AAC 45.074(b)(1), and Attorney Beltzer did not cite any paragraph under this section to support continuance. Claimant was the party who submitted the ARH, in which the affiant swore he had "completed necessary discovery, obtained necessary evidence, and [was] fully prepared for a hearing on the issues." Claimant did not show any surprise evidence that required additional time for response, nor any other change in circumstances that rendered his statement of readiness inaccurate. Moreover, based on the sparse evidence in Claimant's file, the factfinders are concerned delay of this

hearing may not be in his best interests. Claimant was injured nearly a year prior to hearing, and has received none of the workers' compensation benefits to which he may be entitled. It is unknown whether Claimant has been successfully treated for the hardware failures in his foot, whether he is currently working, or even whether he is currently mobile. Claimant's arguments in favor of continuance conflict with the regulations stating that continuances "are not favored by the board, and will not be routinely granted," as well as the Act's policy of quick, efficient, fair, and predictable procedure. AS 23.30.001(4); 8 AAC 45.074(b).

The Fund stated that while its claims adjuster had attended the December 9, 2015 prehearing conference, and received notice of the hearing, the Administrator had not; hence the Fund had neither notice nor actual knowledge of the hearing until it received Luigi's stipulation to continue. This lack of service conflicts with the notice requirements of AS 23.30.110(c). The Fund therefore had a valid due process basis to argue against holding the hearing, under AS 23.30.001(4). Lack of notice to the Fund also supports a finding of good cause under 8 AAC 45.074(b)(1)(L), since surprise caused its lack of readiness. The Fund's arguments are necessary to complete the hearing, and due process requires that the Fund have reasonable opportunity to address claims that may affect its rights and obligations. Granting the continuance will allow all parties to conduct adequate discovery to present necessary arguments at hearing. AS 23.30.135(a); AS 23.30.155(h). The oral order to continue and reschedule the hearing was correct.

All parties agreed to reschedule the hearing for April 28, 2016.

CONCLUSION OF LAW

- 1) The oral order continuing the March 2, 2016 hearing was correct.

ORDER

- 1) The March 2, 2016 hearing is continued until April 28, 2016. The hearing issue will remain whether Claimant is an "employee" or an "independent contractor" for purposes of his claims.
- 2) The parties are ordered to file and serve documentary evidence on or before April 8, 2016.

- 3) The parties are ordered to file and serve hearing briefs on or before April 21, 2016.
- 4) The parties are ordered to remain cognizant of their continuing duty to timely file and serve all medical reports in their possession or under their control.

Dated in Anchorage, Alaska on March 15, 2016.

ALASKA WORKERS' COMPENSATION BOARD

Margaret Scott, Designated Chair

Ron Nalikak, Member

Pamela Cline, 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 JIN WOO LEE, claimant; v. LUIGI'S PIZZA and THE ALASKA WORKERS' COMPENSATION BENEFIT GUARANTY FUND, defendants; Case No. 201513345; 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 March 15, 2016.

Pamela Murray, Office Assistant