

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

KIERSTON REUER,)	
Employee,)	INTERLOCUTORY
Claimant,)	DECISION AND ORDER
)	
v.)	AWCB Case No. 201017877
)	
FIRSTGROUP AMERICA, INC,)	AWCB Decision No. 16-0041
Employer,)	
)	Filed with AWCB Anchorage, Alaska
and)	on June 1, 2016
)	
NEW HAMPSHIRE INSURANCE CO, LT,)	
Insurer,)	
Defendants.)	
)	

On April 22, 2016 the Alaska Workers' Compensation Board (board) issued *Reuer v. Firstgroup America, Inc.*, Dec. No. 16-0033 (*Reuer I*). On April 28, 2016, Kierston Reuer (Employee), through attorney Michael Jensen, filed a petition for reconsideration of *Reuer I*. On May 6, 2016, Firstgroup America, Inc. and New Hampshire Insurance Co. Lt. (Employer) filed an answer to Employee's petition. The board panel addressed the petition with regard to reconsideration without further hearing or filing.

ISSUES

Employee requests the board reconsider *Reuer I*. Employee contends *Reuer I* failed to address Employee's arguments that claims and information contradicting the previously-approved compromise and release agreement (C&R) is barred by res judicata and collateral estoppel. Employee contends that the board gave insufficient weight to the "legal facts" of the case and incorrectly re-opened issues settled in the C&R.

Employer contends *Reuer I* was clear and supported by law, does not conflict with the prior C&R, and adequately addresses the relevant issues.

Should *Reuer I* be reconsidered?

FINDINGS OF FACT

All findings of fact in *Reuer I* are incorporated herein. The following facts and factual conclusions are reiterated from *Reuer I* or established by a preponderance of the evidence:

- 1) On April 22, 2016, *Reuer I* was issued, denying Employee's petition to strike the Employer's Medical Examination (EME) report of Scot Youngblood, M.D. and granting Employer's petition for a second independent medical evaluation (SIME). (*Reuer I*).
- 2) On April 28, 2016, Employee properly filed and served a "Petition for Reconsideration, Clarification and Modification" on the board and Employer. While records indicate that the board received this petition, it was not entered into the board's files and no notice of the filing was given to the designated hearing officer. This appears to be due to a clerical error, and the original filed document is lost. (Petition for Reconsideration, Clarification, and Modification, filed April 28, 2016; Record, Observation, Inference).
- 3) Employee's petition includes a number of contentions summarized as follows:
 1. The board failed to address Employee's argument that facts and argument conflicting with the C&R should be barred by res judicata.
 2. The board failed to address Employee's contention that an SIME should not include examination of behavioral therapy treatment.
 3. The board disregarded the "legal fact" of the compensability of Employee's right knee and spine conditions, violating Employee's due process rights.
 4. The board violates the prior C&R by not binding the SIME physician to the C&R's agreed facts. The "legal facts" are the facts, and should be disclosed to the SIME.
 5. The board is striking a term of the C&R, and cannot strike one term without striking the entire agreement.
 6. If the SIME proceeds, the parts of the EME report that conflict with the "legal facts" should be excluded.
 7. The board erred by not limiting the relevance or scope of the EME opinions, and the EME report should be stricken or edited to comply with the C&R.
 8. Employee's symptoms did not change between the effective date of the C&R agreement and the date of the EME examination, so the symptoms in this case do not "involve complicated analyses of employee's spine, nervous, system, and symptoms," as the board stated.

9. The board erred in stating that Employee did not allege prejudice. Employee's attempt to strike the EME opinions was based on the argument that they were so contrary to the legal facts and so flawed that they are irrelevant and prejudicial.
10. The board erred in stating that Employee argued that, if an SIME were ordered, the issues should be limited to treatment and compensability rather than causation. Employee instead argued that the issues should be limited to treatment, since compensability and causation are not at issue.
11. The board should clarify whether the right knee is subject to SIME as well as the spine.
12. The board should clarify whether the correct SIME form is the March 18, 2016 form filed by Employer or a non-existent February 2, 2015 form as referred to in the order.

(Employee's Petition for Reconsideration, Clarification, and Modification, filed April 28, 2016).

- 4) On May 6, 2016, Employer properly filed and served an answer to Employee's petition. Employer's filing did not result in a notification to the designated hearing officer, but was added to the board's file for this case. (Answer, May 6, 2016; Record, Observation).
- 5) On May 23, 2016, Employer filed with the board its copy of Employee's petition. Prior to this date the board was not aware of Employee's petition. (Petition for Reconsideration, May 23, 2016; Record, Observation).
- 6) Employee's Petition for Reconsideration contains no legal argument or evidence not taken into consideration in *Reuer I*. (Judgement, observations, and unique or peculiar facts of the case).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of this 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...

....

(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.

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 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 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....

“The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a).” *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). A petition for reconsideration has a 15-day time limit for the request, and power to reconsider “expires thirty days after the decision has been mailed ... and if the board takes no action on a petition, it is considered denied.” *Id.* at 743 n. 36. The board must give due consideration to any argument or evidence presented with a petition for reconsideration, but is not required to give conclusive weight to new evidence and has power to consider the new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 957 (July 30, 1982).

ANALYSIS

Should *Reuer I* be reconsidered?

A review of the entire record indicates *Reuer I* did not deviate from established law. Rather, *Reuer I* applied established law and persuasive argument and precedent in denying Employee’s Petition to Strike and granting Employer’s Petition for SIME. Employee’s Petition for Reconsideration presented no new argument or evidence warranting reconsideration. *Whaley*. No legal error occurred and the Petition for Reconsideration will therefore be denied. *Easley*. Denial is also proper because more than 30 days have elapsed since *Reuer I* was issued, and the board therefore lacks the power to grant reconsideration. AS 44.62.540(a).

CONCLUSION OF LAW

KIERSTON REUER v. FIRSTGROUP AMERICA, INC.

Reuer I will not be reconsidered.

ORDER

Employee's April 28, 2016 Petition for Reconsideration of *Reuer I* is DENIED.

Dated in Anchorage, Alaska on June 1, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Henry Tashjian, Designated Chair

/s/
Ron Nalikak, 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 KIERSTON REUER, employee / claimant; v. FIRSTGROUP AMERICA INC, employer; NEW HAMPSHIRE INSURANCE CO, LT, insurer / defendants; Case No. 201017877; 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 June 1, 2016

/s/

Elizabeth Pleitez Office Assistant