ALASKA WORKERS' COMPENSATION BOARD

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

TANA NOE, Employee, Claimant,	)	
v.	)	INTERLOCUTORY DECISION AND ORDER
BIRCHWOOD CAMP OF ALASKA UNITED METHODIST, Employer,	)	AWCB Case No. 201602570 AWCB Decision No. 18-0002
and	)	Filed with AWCB Anchorage, Alaska On January 8, 2018
CHURCH MUTUAL INSURANCE, Insurer, Defendants.	)	

The issue of whether the hearing record should be "frozen" in *status quo* on the date of continuance of the November 7, 2017 merits hearing was heard in Anchorage, Alaska on January 2, 2018. The hearing date was set on November 27, 2017. Attorney Robert Bredesen appeared and represented Tana Noe (Employee). Attorney Colby Smith appeared and represented Birchwood Camp of Alaska (Employer). There were no witnesses. The record closed at the conclusion of the hearing on January 2, 2018.

ISSUE

Employee contends she only agreed to continue the merits hearing previously set for November 7, 2017, because Employer's attorney became ill and was hospitalized. Employee contends the record should be frozen as of that date, with no additional evidence subsequently filed. Employee seeks a hearing on the merits of her claim, presently set for February 20, 2018. Employee

requests an order excluding from the record medical summaries filed by Employer on November 13, 2017, November 29, 2017, and December 27, 2017.

Employer contends no basis exists in fact or law entitling Employee to a freeze of the record. Employer has a standing objection to this case being heard on the merits at this time, as it contends significant discovery and evidence is yet to be exchanged and obtained. Employer contends even though it exercised due diligence in litigating this case, potentially relevant medical records were obtained after November 7, 2017, which it seeks to use in this case.

Should the record be frozen as of November 7, 2017?

FINDINGS OF FACT

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

1) On July 18, 2015, Employee was working for Employer when she lifted a heavy bag of trash, injuring her left shoulder and arm. (First Report of Occupational Injury or Illness, February 19, 2016; Employee's Hearing Evidence, 501-502).

2) On January 31, 2017, Employee filed a claim for temporary total disability (TTD), temporary partial disability (TPD), a permanent partial impairment rating and benefit (PPI), a compensation rate adjustment, a finding of unfair or frivolous controversion, medical and related transportation costs, penalty, interest, reemployment benefits eligibility review, and a second independent medical examination (SIME). (Workers' Compensation Claim, January 31, 2017).

3) On March 9, 2017, the parties attended a prehearing conference. The conference summary states the parties discussed and came to an agreement concerning releases. Employee's non-attorney representative stated she would recommend her client sign the releases as mutually modified by the parties. (Prehearing Conference Summary, March 9, 2017).

4) On March 13, 2017, attorney Robert Bredesen filed his appearance on behalf of Employee. (Notice of Entry of Appearance, March 13, 2017).

5) On April 12, 2017, Employer took Employee's deposition. (Record). Employer contends Employee testified in her deposition to being involved in prior car accidents, after which she pursued chiropractic treatment for her spine. (Employer's Hearing Brief).

6) On August 2, 2017, Employee filed an affidavit of readiness for hearing (ARH) on her January 31, 2017 claim. (ARH, August 2, 2017).

7) On August 9, 2017, Employer filed an affidavit of opposition to Employee's August 2, 2017 ARH stating depositions of Employee and other witnesses are yet to be conducted. Employer's opposition requests no hearing be set until discovery is complete. (Affidavit of Opposition, August 9, 2017).

8) On August 29, 2017, the parties attended a prehearing conference. The conference summary states:

> Employee representative confirmed that discovery is complete for the purposes of issues identified for hearing and advised that he reserves all rights moving forward.
>
> Employer representative objected to scheduling a hearing absent an agreement from Employee representative that discovery is complete. The parties stipulated to an oral hearing to be held on 11/7/2017, for approximately 4 hours. . . . (Prehearing Conference Summary, August 29, 2017).

9) On September 27, 2017, Employer mailed a letter to Century 21 Insurance requesting Employee's 2002 car accident claim file. The letter was returned undeliverable as addressed. On October 18, 2017, Employer re-sent the request to Century 21 at a different address. After numerous conversations with Century 21 in November and December 2017, Employer received the requested records on December 22, 2017. The records were filed on a medical summary on December 27, 2017. (Affidavit of Jeannie Tatum, Legal Assistant, December 27, 2017).

10) On October 16, 2017, Employer filed a petition to continue the November 7, 2017 hearing. The memorandum in support of Employer's October 16, 2017 petition states Employee was deposed on April 12, 2017, during which she testified she was involved in a car accident but could not recall the date. Employee testified the accident only injured her low back. Employer's memorandum states on September 29, 2017, Employer received medical records indicating the date of the car accident was April 1, 2002 and that Employee did have cervical complaints and a diagnosis of cervical joint dysfunction. Employer's memorandum contends there is medical evidence supporting the conclusion Employee's July 18, 2015 work injury produced only a temporary aggravation of a pre-existing condition, and Employer needs time to conduct additional investigation. (Petition, October 16, 2017).

11) Employer has not filed an ARH on its October 16, 2017 petition to continue. (Record).

12) On November 3, 2017, the parties attended a prehearing conference. The conference summary states the parties were unable to agree with regards to the continuance of the November 7, 2017 hearing. Employer's October 26, 2017 petition to continue was added as a preliminary issue to be addressed at the start of the November 7, 2017 hearing. (Prehearing Conference Summary, November 3, 2017).

13) On Monday, November 6, 2017, the parties attended an emergency prehearing conference. The conference summary states attorney Colby Smith makes "only an emergency appearance today" on behalf of Employer's attorney, who was hospitalized over the weekend, and has a physician's recommendation to avoid work stress for two weeks. Mr. Smith requested a continuance of the November 7, 2017 hearing. The conference summary states:

> Mr. Bredesen agreed to a continuance . . . but requested the evidence and issues be maintained/preserved. Mr. Bredesen requested a written record hearing be set on only the discovery issues concerning "freezing" the case, and to compel Employer to produce discovery it has requested.
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> Board Designee stated since [Employer's attorney] is ill, and Mr. Smith is making only an emergency appearance today, no substantive discussion can take place concerning hearing issues or discovery.
>
> A prehearing will be set a few weeks out, so that the issue of Employer's representation can be sorted out.

The Board designee ordered the November 7, 2017 hearing continued and set a prehearing to address issues and discovery for a merits hearing. (Prehearing Conference Summary, November 6, 2017).

14) On November 27, 2017, the parties attended a prehearing conference. The conference summary states:

> . . . Parties discussed whether the record should be "frozen," since a hearing was previously scheduled for November 7, 2017, but continued. Employer requested an oral hearing date be set on its October 16, 2017 petition to continue hearing under 8 AAC 45.074(d)(1)(c) and (d). Mr. Bredesen did not object to the hearing being set. A merits hearing was set for February 20, 2018 on Employee's January 31, 2017 workers' compensation claim, minus the issue of attorney's fees.

The Board designee set two hearings. The issues listed are:

> Issue for January 2, 2018 hearing: Whether the hearing record should be "frozen" as it was prior to November 7, 2017 and whether the filing of an ARH waives or precludes a party from obtaining discovery.
>
> Issue for February 20, 2018 hearing: Employee's January 31, 2017 workers' compensation claim. (Prehearing Conference Summary, November 27, 2017).

15) On December 21, 2017, Employer filed a letter styled "Clarification of November 27, 2017 Prehearing Conference Summary." The letter stated Employer previously contended ongoing discovery requested by Employee was no longer required since an ARH was filed. As stated in the November 27, 2017 prehearing conference summary, this issue is to be addressed at the January 2, 2018 hearing. Employer withdraws this objection. Employer has continued to produce medical records and evidence after the date of the Affidavit of Readiness for Hearing. Since Employer withdraws its objection to continue discovery, the only remaining issue for the January 2, 2018 hearing is whether the record should be "frozen" as it was prior to the November 7, 2017 continuance. (Letter from Colby Smith, December 21, 2017).

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 this chapter
> > . . . .
> >
> > (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.

A decision may be based not only on direct testimony and other tangible evidence, but also on "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 23.30.110. 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. . . .

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. . . .

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

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

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

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

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(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;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(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;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection.

(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.

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. The board will, in its discretion, examine witnesses and will allow all parties present an opportunity to do so. . . .
. . . .

(b) The order in which evidence and argument is presented at the hearing will be in the discretion of the board, unless otherwise expressly provided by law. All proceedings must afford every party a reasonable opportunity for a fair hearing.

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

(2) to introduce exhibits;

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence.

(d) A party who does not testify in his own behalf may be called and examined by any party as if under cross-examination.

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's

> possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
> . . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999).

ANALYSIS

Should the record be frozen as of November 7, 2017?

Employee filed an affidavit of readiness for hearing (ARH) on her January 31, 2017 claim on August 2, 2017. AS 23.30.110(c). Employer filed an affidavit of opposition to Employee's August 2, 2017 ARH stating discovery is incomplete. At the August 29, 2017 prehearing conference, the designee set a hearing on Employee's claim for November 7, 2017. AS 23.30.110. Employee contends the November 7, 2017 hearing was continued only because of Employer's attorneys' sudden illness and hospitalization. Employee contends she has filed an ARH on her claim and wishes to have the claim heard. Employee seeks an order "freezing" the hearing record in *status quo* as of November 7, 2017. Employer contends no factual or legal basis exists to freeze the record and that, despite exercising due diligence, material evidence was obtained after November 7, 2017 which Employer should be allowed to use in this case.

If a party opposes a hearing request, the designee shall within 30 days of the filing of the opposition conduct a prehearing conference and set a hearing date. AS 23.30.110(c). The Act's language requiring a hearing being set subsequent to the filing of an ARH is mandatory, rather than discretionary. *Id*. Continuances or cancellations of hearings are disfavored, and may only be

granted for good cause. 8 AAC 45.074. Good cause exists when a representative of a party becomes ill. *Id*.

Hearings in workers' compensation cases shall be decided on their merits, and all parties shall be afforded opportunity for their arguments and evidence to be fairly considered. AS 23.30.001. The Act grants a hearing panel broad authority to investigate a claim and conduct hearings in the manner in which it can best ascertain the rights of the parties. AS 23.30.135. The statute specifically states hearing panels are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in the Act. *Id*.

Employee relies on *Williams v. Flowline Alaska, Inc.*, AWCB Decision No. 16-0039 (May 20, 2016) in support of her position she is entitled to a freeze of the record. In *Williams*, a merits hearing was continued when the employee's attorney became unavailable due to delays during an adoption proceeding in which the attorney was involved in Poland. The employer requested a *status quo* order, asserting it would be prejudiced if the evidence was not frozen because it had timely filed its brief, witness list, evidence, and had "shown its hand" prior to hearing. The employee opposed the employer's request for a *status quo* order. The Board in *Williams* decided to impose a limited *status quo* freeze, holding the record frozen as of the hearing date with respect to witness lists, evidence and briefing, but permitting the parties to depose those witnesses and rely on that testimony at a subsequent merits hearing. Here, Employee seeks to freeze out all evidence as of the November 7, 2017 hearing date, including presumably Employer's right to depose witnesses. *Williams* is therefore distinguishable, since it granted only a narrowed freeze of the record, while still preserving the parties' rights to gather and present material and relevant evidence obtained after the hearing had been set, but continued.

The illness of Employer's attorney was not an event within its control. There is no evidence of Employer deliberately using the illness of its attorney to develop evidence or gain a strategic advantage. *Rogers & Babler*. While Employee's contention Employer should not benefit from delay is well taken, this contention must be weighed against the legislature's mandate that workers' compensation cases be heard on their merits whenever possible. AS 23.30.001. Importantly, Employee does not contend Employer's evidence filed after the November 7, 2017

hearing date is irrelevant or otherwise inadmissible. To exclude relevant and material evidence from the record would be to decide the case on a procedural technicality rather than the merits. *Id*.; AS 23.30.135; *Granus.* Excluding evidence does not serve the interest of obtaining the best and most thorough record on which to base a decision. No basis exists in fact or law to freeze the record in *status quo* prior to the November 7, 2017 hearing date. The parties may file material and relevant evidence obtained after November 7, 2017, for the February 20, 2018 hearing on Employee's January 31, 2017 claim, in accord with filing deadlines and requirements. 8 AAC 45.120.

CONCLUSION OF LAW

The record should not be frozen as of November 7, 2017.

ORDER

1) Employee's request to have the hearing record frozen in *status quo* as of February 7, 2017 is denied.

2) Records obtained after the November 7, 2017 hearing date may be admitted into evidence prior to the February 20, 2018 hearing on Employee's January 31, 2017 claim, subject to appropriate admissibility and relevance objections.

3) If a party objects to newly-filed evidence based on relevancy, privilege, or hearsay, it may file a petition or orally object at the February 20, 2018 hearing.

4) Employer's October 26, 2017 petition to continue the hearing on the merits is added as a preliminary issue to be addressed at the start of the February 20, 2018 hearing. In the event Employer seeks a hearing on that petition sooner, it may file an ARH.

Dated in Anchorage, Alaska on January 8, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Dave Kester, Member

DISSENT OF BOARD MEMBER RICK TRAINI

The Act empowers the Board with broad authority to determine the order in which evidence and argument is presented, in such a manner as it may best ascertain the rights of the parties. AS 23.30.135; 8 AAC 45.120. As in *Williams*, Employee here has filed her witness list and evidence and has requested a hearing on her January 31, 2017 claim. By the time of the February 20, 2018 merits hearing, Employer will have had two years and seven months from the date of Employee's July 18, 2015 work injury to make discovery and prepare for hearing. AS 23.30.001; *Rogers & Babler*. Employer will have had over a year to prepare for hearing since Employee filed her January 31, 2017 claim.

Employer took Employee's deposition on April 12, 2017, during which Employee testified to being involved in a car accident for which she sought chiropractic treatment. Employer waited until September 27, 2017 to request the Century 21 Insurance records concerning Employee's car accident and related treatment history, and filed those records on a medical summary on December 27, 2017. Employer should not be allowed to gain a strategic advantage because of an unexpected continuance due to a medical condition of one of its attorneys. Freezing the record in this case as of November 7, 2017, will protect the parties from benefitting from such delay and continuing to investigate the case after it has already been set for a hearing on the merits. For this reason, I dissent with the majority's decision and believe the hearing record should be frozen in *status quo* as of November 7, 2017, and the medical summaries filed by Employer on November 13, 2017, November 29, 2017, and December 27, 2017, should be excluded from the record.

/s/
Rick Traini, 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 TANA NOE, employee / claimant; v. BIRCHWOOD CAMP OF ALASKA UNITED METHODIST, employer; CHURCH MUTUAL INSURANCE, insurer / defendants; Case No. 201602570; 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 January 8, 2018.

/s/

Elizabeth Pleitez, Office Assistant