ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD QUATTLEBAUM, Employee, Claimant,	)	INTERLOCUTORY DECISION AND ORDER
v.	)	AWCB Case No. 200916335
STATE OF ALASKA, Employer, (Self-insured), Defendant.	)	AWCB Decision No. 18-0015 Filed with AWCB Anchorage, Alaska on February 16, 2018

Richard Quattlebaum's (Employee) February 20, 2015 claim was scheduled to be heard on February 14, 2018 in Anchorage, Alaska. The hearing date was selected on November 1, 2017. Employee appeared and testified. Attorney Christopher Beltzer appeared and represented Employee. Assistant Attorney General Patricia Shake appeared and represented the State of Alaska (Employer). There were no other witnesses. The record closed at the conclusion of the hearing on February 14, 2018.

ISSUE

As a preliminary issue, the panel addressed Employee's February 13, 2018 petition to continue the February 14, 2018 hearing. Employer objected to continuing the hearing and requested the hearing proceed. After the panel orally granted Employee's request to continue the hearing, Employer requested the hearing record be frozen as of that date. An oral order issued continuing the hearing for 45 days and granting the record freeze, with the exception of the opinions and testimony of Marius Maxwell, M.D.

Was the oral order continuing the February 14, 2018 hearing correct?

FINDINGS OF FACT

The following is established by a preponderance of the evidence:

1) On February 20, 2015, Employee filed a claim for temporary total disability (TTD) from September 17, 2014 ongoing, medical and related transportation costs, penalty, interest, and unfair or frivolous controversion. (Workers' Compensation Claim, February 20, 2015).

2) On March 24, 2017, Employee filed an affidavit of readiness for hearing (ARH) on his February 20, 2015 claim. (ARH, March 24, 2017).

3) On July 12, 2017, the parties attended a prehearing conference during which they agreed to hold the March 24, 2017 ARH in abeyance due to a pending second independent medical examination (SIME). (Prehearing Conference Summary, July 27, 2017).

4) On October 4, 2017, Employee filed an ARH on his February 20, 2015 claim. (ARH, October 4, 2017).

5) On November 1, 2017, the parties attended a prehearing conference and agreed to a hearing on Employee's February 20, 2015 claim for February 14, 2018. (Prehearing Conference Summary, November 1, 2017).

6) On January 4, 2018, the parties attended a prehearing conference during which they agreed the only issues for the February 14, 2018 hearing were medical costs, transportation costs, and attorney's fees and costs. (Prehearing Conference Summary, January 4, 2018).

7) In the afternoon of February 13, 2018, Employee filed a petition to continue the February 14, 2018 hearing. The petition attached a letter, dated February 12, 2018, from Marius Maxwell, M.D., concerning recent treatment. The petition sets out three grounds upon which Employee believes a continuance of the hearing is necessary:

- Employer's hearing brief alleges it paid benefits based on misrepresentations by Employee. Employee should have opportunity to examine Employer's insurance adjusters as to this contention, yet no adjuster who worked with Employee on his claim was listed on Employer's hearing witness list.

- Employer's hearing brief for the first time requests factual findings Employee misled Employer for purposes of obtaining benefits. Employee should have opportunity to examine individuals associated with this contention in order to defend against this allegation.

- After the January 4, 2018 prehearing set the issues for the February 14, 2017 hearing, Employee obtained medical care from Dr. Maxwell. On February 12,

> 2018, Dr. Maxwell issued a written opinion concerning his examination of Employee. Due to short notice, Dr. Maxwell was unavailable to testify at hearing. Employee anticipates calling Dr. Maxwell as a witness, and needs additional time. (Employee's Hearing Brief, February 13, 2018).

8) Employee testified the examination resulting in the February 12, 2018 letter from Dr. Maxwell occurred on a Monday, two days prior to the February 14, 2018 hearing, with another examination the previous week. (Employee).

9) Employer would waive cross-examination of Dr. Maxwell if the hearing proceeded as scheduled, rather than being continued. (Employer's Hearing Argument).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (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. . . . .
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> (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, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.135. Procedure before the board.** 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. . . .
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> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.**
> . . . .

> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter.

The Alaska Supreme Court has held preponderance of the evidence of fraud is the standard of proof for an employer to recover reimbursement of workers' compensation benefits if an employee obtained benefits by knowingly making a false or misleading statement or representation. *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

> **8 AAC 45.074. Continuances and cancellations.** (a) A party may request the continuance or cancellation of a hearing by filing a
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> (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
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> (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
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> (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;
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> (2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.
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> (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,
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> (1) good cause exists only when
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> (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
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> (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;
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> (2) the board or the board's designee may grant a continuance or cancellation under this section
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> (A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;
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> (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
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> (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. . . .

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;
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> (2) to introduce exhibits;
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> (3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;
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> (4) to impeach any witness regardless of which party first called the witness to testify; and
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> (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.
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> (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.
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> (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. . . .
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> (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).

The Board recently addressed the issue of whether a hearing record should be frozen in status quo on the date of a scheduled merits hearing. In *Noe v. Birchwood Camp of Alaska*, AWCB Decision No. 18-0002 (January 8, 2018), the employer's attorney became ill and was hospitalized just prior to a scheduled merits hearing. The employee agreed to continue the hearing, but requested the record be frozen as of the hearing date. *Noe* denied the employee's

request to freeze the record, noting the illness of the employer's attorney was a circumstance not within its control. *Noe* held that to exclude relevant and material evidence from the record would be to decide a case on a technicality, rather than on the merits. *Id*. at 11.

ANALYSIS

Was the oral order continuing the February 14, 2018 hearing correct?

The day before the February 14, 2018 hearing, Employee's attorney obtained a medical opinion from Dr. Maxwell, with whom Employee recently treated, which he contends supports his case on the issue of causation. Employee's attorney stated at hearing he intends to call Dr. Maxwell as a witness, but that the doctor was unavailable on short notice. Employee also contends he should be able to respond to Employer's allegations he obtained benefits through misrepresentations. Employer opposes a continuance of the merits hearing, and was prepared to argue and present evidence.

The legislature intended parties to hearings under the Act have opportunity to be heard and for their arguments and evidence to be fairly considered, and to call and examine relevant witnesses. AS 23.30.001; 8 AAC 45.120. To exclude relevant and material evidence from the record is to decide the case on a procedural technicality, rather than on the merits. *Id*; *Granus*. Although continuances are disfavored, hearings may be continued on the grounds a witness is unavailable and cannot be deposed in time. 8 AAC 45.074(b)(1)(A).

Noe v. Birchwood Camp denied the employee's request to freeze the record after the employer's attorney became ill prior to hearing. Here, Employee requests a continuance on grounds new medical records have emerged, the author of which was unavailable to testify on short notice. *Noe* is distinguishable because the unavailability of the employer's attorney was a circumstance unrelated to the evidentiary record.

Employee's claim is for medical benefits. Employer has not shown it would be prejudiced from continuing the merits hearing for 45 days so Employee can present Dr. Maxwell's testimony. AS 23.30.001; *Rogers & Babler*. To protect Employer from Employee engaging in additional preparation or discovery after a merits hearing was set, but continued due to unavailability of a

witness, the record is frozen in status quo except as to the opinions and testimony of Dr. Maxwell. AS 23.30.135. Any future requests by Employee to continue a hearing on the merits of his claim will be granted only under exceptional circumstances. *Id*.

Mere allegations in a hearing brief, without evidence in support, are likely insufficient to establish misrepresentation for the purposes of obtaining benefits. AS 23.30.250(b); *Shehata*. If Employer chooses to present evidence supporting those allegations, Employee's rights to rebut and challenge that evidence remain. Employee's contentions he needs more time to call and examine unlisted and unknown witnesses related to Employer's allegations of misrepresentation in its hearing brief are without merit and this is not grounds upon which a continuance is granted in this case.

CONCLUSION OF LAW

The oral order continuing the February 14, 2018 hearing was correct.

ORDER

1) The merits hearing scheduled for February 14, 2018 is continued no more than 45 days from that date.

2) The record is frozen in status quo as of February 14, 2018 except as to the opinions and testimony of Marius Maxwell, M.D.

3) Employee is ordered to request a prehearing conference so a mutually-agreeable hearing date can be set on his claim, in accord with this decision and order.

4) Additional requests by Employee for continuances of a hearing on his claim will only be granted under exceptional circumstances.

Dated in Anchorage, Alaska on February 16, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Nancy Shaw, Member

/s/
Amy Steele, 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 RICHARD QUATTLEBAUM, employee / claimant; v. STATE OF ALASKA, employer; ALASKA, STATE OF, insurer / defendants; Case No. 200916335; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 16, 2018.

/s/
Nenita Farmer, Office Assistant