

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MICHAEL JONES,)
Employee,)
Claimant,) FINAL DECISION AND ORDER
v.)
AWCB Case No. 201506393
AES HOUSTON CONTRACTING)
COMPANY, INC.,) AWCB Decision No. 18-0020
Employer,) Filed with AWCB Fairbanks, Alaska
and) on February 27, 2018
ARCTIC SLOPE REGIONAL)
CORPORATION,)
Insurer,)
Defendants.)

Michael Jones' June 17, 2015 claim was heard on September 7, 2017 in Fairbanks, Alaska. This hearing date was selected on April 17, 2017. Attorney Andrew Wilson appeared and represented Michael Jones (Employee). Attorney Nora Barlow appeared and represented AES Houston Contracting Company, Inc. (Employer). Witnesses included Employee, Hugh McCaffrey, Anthony Williams, Jerry Delaney, Kris Jordan, Charlie Bennett, and Rachel Mentzel. The record closed at the hearing's conclusion on September 7, 2017.

ISSUE

Employee contends he suffered a mental injury after being abandoned in a winter storm near Deadhorse, Alaska, and is entitled to benefits under the Act. Employer contends Employee did not suffer a mental injury as the result of the stress of his work, but even if he did, the stress was neither extraordinary nor unusual compared to other individuals in a comparable work environment.

Did Employee suffer a compensable mental injury?

FINDINGS OF FACT

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

1. Employee worked as a welding inspector for Employer on Alaska's North Slope. Although he had worked on the slope on two prior occasions, both of those had been during the summer. The winter of 2015 was the first time he had worked on the Slope during winter. Before going to the Slope, Employer provided him with arctic gear, including insulated bib overalls and a coat. (Employee).

2. The winter construction season on the slope runs from January to March or April, depending on the weather. Once the tundra has frozen, ice roads can be built over the fragile environment to reach drill sites that are not on the main roads. All of the roads are marked with delineators at 40 foot intervals. (Mentzel; Bennett Deposition).

3. On February 28, 2015, Employee was working near Drill Site 16, several miles from the base camp across the Sag River. (Employee). Other welding inspectors, welders, and other workers were in the same area. (Bennett).

4. All of Employer's employees were equipped with Harmony radios. Each employee had a unique number, and could be reached by dialing that number. There was also an "open mike" mode, in which all other radios could hear an individual broadcasting, and a "panic button," which would alert all users. (Employee; Mentzel).

5. It was widely known that a storm was approaching, but it arrived sooner than expected, shortly after 4:00 p.m. By 5:00 p.m., the winds were 50 miles-per-hour with white-out conditions, and the temperature was about 27 degrees Fahrenheit. (Bennett Deposition, Weather Underground Weather History, February 28, 2015).

6. Storms and weather conditions on the slope are categorized as Phase I, Phase II or Phase III. In Phase I conditions, at least 10 delineators are visible, and work can continue. When only five delineators can be seen, it is Phase II, and travel is restricted to convoys of two or more vehicles. In Phase III conditions, two or less delineators are visible and only emergency travel in convoys is allowed. (Mentzel).

7. Employee had training and the proper gear for Phase III conditions. (Employee Deposition).

8. When the storm hit, the Employee got into his truck, put his flashers on and waited for other employees in the immediate area to form a convoy. When the convoy began to move, Employee could only see the taillights of the vehicle in front of him. (Employee).

9. The convoy from Drill Site 16 joined convoys from other work sites, but the entire convoy was stopped again because BP incident command closed the bridge over the Sag River due to safety concerns. It is unclear at what time the convoy reached the bridge, but at this point, the convoy consisted a loader at the front, four or five buses, and about 70 vehicles in total. Charlie Bennett was driving the last vehicle in the convoy, and was about a mile and one-half from the bridge. (Bennett). Employee was close to the front of the convoy, about 150 to 200 yards from the bridge. (Employee Deposition).

10. Charlie Bennett is a supervisor, although not Employee's direct supervisor. (Mentzel).

11. About fifteen minutes after stopping at the bridge, a mechanic stopped at Employee's truck to ensure the transmission linkage was clear and the transmission could be put in park. The mechanic told Employee to stay in his truck, and that someone would come get him. (Employee).

12. Blowing snow can clog air filters, causing engines to die. (Jordan). Around 8:00 p.m., Charlie Bennett learned vehicles were starting to die. After discussions with another supervisor near the front of the convoy, they determined it would be best to get everyone together on a bus. About 9:00 p.m. he began walking toward the bridge leading some workers toward a bus near the front of the convoy. He stopped at every vehicle and told the occupants to get ready, he would be back to get them. Mr. Bennett made five trips up and down the road, leading workers to the bus. He did not know Employee, but on his last trip, one individual refused to leave his truck stating "I'm fine," and locked the doors. Mr. Bennett believed the individual would be okay, as he was wearing his arctic gear, had a Harmony radio, and there were mechanics working nearby. (Bennett; Bennett Deposition).

13. The employees eventually transferred to a second bus, and about 3:00 or 3:30 in the morning, they received permission to cross the Sag River Bridge. About 70 employees returned to camp on the bus. (Bennett). By that time, the winds had dropped to 25 to 30 mph, but the temperature had dropped to minus 15. (Weather Underground Weather History, March 1, 2015).

14. Employee testified that after the mechanic had cleared his transmission linkage, no one stopped at his truck or knocked on the window. He was "freaked out to the max," and his heart

was pounding. He heard no radio chatter and eventually fell asleep. He awoke about 3:00 or 3:30 in the morning. His truck was barely running and there was ice on the inside of the windows. Because the wind was so strong, he was unable to open his door until he had lowered the windows on both the driver's and passenger's doors. He walked to the next bus and found it was empty with the door open so he proceeded to a truck that was still running. While outside, Employee wore his arctic gear, including a ski mask and goggles and grips on his boots. Employee was concerned about being outside because polar bears had been seen nearby. About 4:30, he realized he was alone and attempted to contact two individuals by using the open mike feature on the Harmony radio, but received no response. He again went to sleep until 7:00 a.m., when he attempted to contact his supervisor, but the call went unanswered. He then called another welding inspector, who answered and in turn contacted Employee's supervisor. Employee was informed people were coming to get him but he was not picked up until 1:30 p. m. on March 1st. Employee stated that when he awoke at 7:00, vehicles were parked randomly, and had not been moved to the side of the road. (Employee; Employee Deposition).

15. Other workers on the Slope were stranded because of the storm. (Employee Deposition).

16. At 7:00 a.m., the temperature was minus 16 degrees, the wind was 29 mph, and there was light snow. (Weather Underground Weather History, March 1, 2015).

17. Although most of the employees had returned to camp around 3:30 a.m., two mechanics stayed behind to move vehicles to the side of the road. If any vehicles were running, they turned them off. They travelled up and down the road in a large loader, with bright lights and a beacon on the roof, although much of the time they were working outside. The mechanics remained about one and one-half hours after the other workers had crossed the bridge. They had their Harmony radios on at all times, and were using them to communicate with each other. (Jordan).

18. Employee left the slope at the end of his normal rotation in March 2015 and did not return. (Employee).

19. On April 8, 2015, Employee went to Susan Aviotti, LPC. Ms. Aviotti's chart note consists of a single sentence stating Employee had brought a "detailed letter" of his account of the storm. Employee's account, which is attached to Ms. Aviotti's chart note, is one and on-half pages, single spaced, and recounts the events of February 28th and March 1st. Employee's recitation of events is essentially the same as his hearing testimony, but he clarifies that by the time he awoke at 7:00 a.m., the storm had passed. He stated that since the incident, if he was driving and the

snow started blowing, his heart would begin pounding, his blood pressure would rise, and he would have to pull over. He reported stress, headaches, and nightmares in which he is lost and disoriented in a storm. (Ms. Aviotti, Chart Note, April 8, 2015; Employee Statement).

20. On April 22, 2015, Employee returned to Ms. Aviotti, and they discussed the incident again. Ms. Aviotti's notes consists of three short sentences. (Ms. Aviotti, Chart Note, April 22, 2015).

21. Employee returned to Ms. Aviotti on May 7, 2015 and reported Employer was disputing his workers' compensation claim. Employee reported he was finding it harder to deal with everyday life issues and was avoiding going to town, but he also reported he spends two hours in a gym and had participated in a martial arts tournament. (Ms. Aviotti, Chart Note, May 7 2015).

22. On April 22, 2015, Employee filed a claim for temporary total disability (TTD) resulting from post-traumatic stress disorder, a consequence of being left in the storm. (Claim, Undated). On June 19, 2015, Employee, now represented by counsel, filed an amended claim seeking TTD, permanent partial impairment (PPI), medical and transportation costs, interest and attorney fees and costs. (Claim, June 17, 2015).

23. In all, Employee saw Ms. Aviotti eight times. She determined Employee was suffering from PTSD as the result of his experiences during the storm. (Aviotti Deposition).

24. On October 2, 2015, Employee was seen by David Glass, M.D., a psychiatrist, for an employer's medical evaluation (EME). Employee told Dr. Glass that during the storm, it was minus 71 degrees during the storm, with winds of 40 to 60 mph. Employee told Dr. Glass he has selected Ms. Aviotti because she specialized in PTSD and his sessions with her had been helpful. Dr. Glass administered a MMPI-2 test to Employee and the results did not indicate any distress or psychiatric symptoms, which was incompatible with PTSD, although adjustment disorder with anxiety could explain Employee's symptoms after the incident. (Dr. Glass, EME Report, October 2, 2015).

25. Employee is not a credible witness. When describing the storm to Dr. Glass, he greatly exaggerated the temperature, and omitted the fact that he had both training and proper equipment for Phase III condition. In his deposition, he initially stated Employer had stopped providing drinking water, only to later admit it was readily available. His assertions that he was "freaked out to the max," and his heart was pounding are inconsistent with the fact he twice fell asleep for several hours. (Experience; Observation).

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;

....

(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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

AS 23.30.010. Coverage.

(a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120 (a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

(b) Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work

evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer.

In *Kelly v. State of Alaska*, 218 P.3d 291 (Alaska 2009), the Supreme Court addressed a case in which a prison guard, Kelly, filed a claim for job-related stress after being threatened with serious injury or death by an inmate who had been convicted of murder and was armed with a weapon. The Board had found the guard's stress was not compensable as it would not be unusual or extraordinary for correctional officers to be threatened by inmates. The Court noted that a worker's perception that he feels stress is by itself inadequate to establish "extraordinary and unusual" stress. *Id.* at 300. The Court reversed, explaining that while other guards had been threatened, it was often by intoxicated inmates or inmates behind bars. When Kelly was threatened, he was alone, unarmed, locked in a module with an armed inmate who threatened to stab him in the eyes and then stab him to death.

AS 23.30.120. Presumptions.

(a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter

ANALYSIS

Did Employee suffer a compensable mental injury?

Because Employee is claiming a mental injury caused by mental stress, the AS 23.30.120 presumption does not apply; Employee must prove by a preponderance of the evidence that the work stress was extraordinary and unusual in comparison to that experienced by other individuals in a comparable work environment; and that the work stress was the predominant cause of the mental injury. He did not do so.

The February 28th/March 1st, 2015 storm was a major storm. It clearly caused extremely difficult driving conditions, but all of the drivers in the convoy were subject to the same driving conditions, and once the convoy had stopped, driving was no longer a concern. Employee's claim that after the convoy had stopped at the bridge he was "freaked out to the max," and his heart was pounding are inconsistent with the fact he soon fell asleep. When Employee awoke around 3:00 or 3:30, the winds had decreased nearly by half to 25 to 30 mph. When Employee

realized he was alone, he attempted to call two individuals on his Harmony radio using the open mike feature, and they did not respond. However, there is no indication he informed anyone who was listening that he was in distress, either over the open mike feature or by using the panic button. That, coupled with the fact he again fell asleep for several hours is substantial evidence he was not experiencing significant stress. Additionally, Employee was not in fact alone; two mechanics were working in the area with a large loader with lights and a beacon. By his own admission, when Employee awoke at 7:00, the storm was over.

Mr. Bennett is credible; his testimony that only one individual in the convoy refused to get on the bus, and the fact that only Employee was left behind strongly suggest that Employee was the one who refused to get on the bus. It is also evidence Employee was not experiencing extraordinary or unusual stress. The preponderance of the evidence is that Employee did not experience extraordinary or unusual stress, regardless of whether his stress is compared to other individuals in the same work environment.

CONCLUSION OF LAW

Employee did not suffer a compensable mental injury.

ORDER

Employee's June 17, 2015 claim is denied.

Dated in Fairbanks, Alaska on February 27, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Patricia Vollendorf, Board Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord 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 accord 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 Final Decision and Order in the matter of MICHAEL JONES, employee / claimant; v. AES HOUSTON CONTRACTING COMPANY, INC., self-insured employer / defendant; Case No. 201506393; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on February 27, 2018.

/s/

Ronald C. Heselton, Office Assistant II