

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JANA L. WRIGHT, )  
 )  
 Employee, ) INTERLOCUTORY  
 Claimant, ) DECISION AND ORDER  
 )  
 v. ) AWCB Case No. 201604175  
 )  
 ) AWCB Decision No. 18-0117  
 )  
 STATE OF ALASKA, ) Filed with AWCB Juneau, Alaska  
 ) on November 6, 2018  
 Self-Insured Employer, )  
 Defendants. )  
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Jana L. Wright's (Employee) September 12, 2016 claim was scheduled to be heard on October 23, 2018 in Juneau, Alaska, a hearing date selected on August 28, 2018. A June 20, 2018 affidavit of readiness for hearing (ARH) gave rise to this hearing. Employee appeared telephonically and testified. Attorney Adam Franklin appeared and represented Alaska Marine Highway System and State of Alaska (Employer). There were no other witnesses. The record closed at the hearing's conclusion on October 23, 2018.

## ISSUE

As a preliminary issue, Employee orally requested a hearing continuance. Employee contended a hearing continuance should be granted because several of her witnesses were unavailable. Employer objected to continuing the hearing and requested the hearing proceed. The panel orally granted Employee's request to continue the hearing.

**Was the oral order continuing the October 23, 2018 hearing correct?**

FINDINGS OF FACT

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

1) On March 14, 2016, Employee reported trouble breathing and a non-productive cough aggravated by chemicals while working for Employer on the M/V Kennecott. (Employee First Report of Occupational Injury or Illness, March 14, 2016).

2) On March 14, 2016, Employee visited the emergency room at Ketchikan General Hospital for a dry cough starting three days ago. Employee reported trouble breathing. She was diagnosed with a viral infection and instructed, “No strenuous activity. Rest. Return to work when better. ([W]ear a mask at work).” Employee was prescribed an albuterol inhaler, Robitussin AC, and Tessalon perles. (Emergency Room Report, March 14, 2016).

3) On March 16, 2016, Employee followed up with Donna Paul, ARNP, for ongoing chest congestion and cough. Employee reported mild intermittent episodes of shortness of breath worse at night and a persistent cough beginning three months ago. ARNP Paul assessed asthma exacerbation, cough and smoking history greater than 30 pack years. ARNP Paul noted:

Unfortunately patient presents with an extended history of cough. 11/30 she was seen by acute care and treated for bronchitis with prednisone and Z-Pak. She was instructed to return to the clinic in 10 days if not improved. She did return to the clinic at that time for persistent cough but again saw the acute care provider and not her PCP. She was given an inhaled steroid and was told to follow up with her PCP in 2 weeks if she was still having an issue. Patient reports that she will use the albuterol but that she is not using the inhaled steroid because it is “scary” – chest x-ray at that time was negative. Patient had thought that she had improved but was seen again in acute care 2/5/2016 with a flare of her bronchitis and a secondary ear infection which was treated with albuterol and Augmentin. She returned to work on the ferry and found herself becoming more and more [short of breath] - especially at night. She had a roommate with a humidifier and it got a lot worse when she moved to another room. She left the boat that morning on 3/14/2016 and was seen in the ER in [Ketchikan]. Normal EKG and chest x-ray - she was instructed to follow through with her PCP and was given 2 forms of cough suppressant. She needs a work excuse today. . . . The good news is that patient has stopped smoking about 1 week ago because of this cough. (Paul Chart Note, March 16, 2016).

4) On March 21, 2016, Employee followed up with Lynn Prysunka, M.D., for respiratory issues. Employee reported ongoing cough, wheezing, shortness of breath and right ear pain. Dr. Prysunka diagnosed mild intermittent asthma beginning months ago, aggravated by airborne

chemicals and respiratory infections and noted Employee's family history of brittle severe asthma. She stated Employee "did not really have symptoms of this until a viral infection last fall. Recently Employee's job on the ferry exposed her to fumes while cleaning. Her symptoms have improved now but she continues to feel short of breath and wheezy with moderate activity." Employee used both nebulized and metered doses of albuterol. Employee's examination was fairly normal. Dr. Prysunka took Employee off work for another week and scheduled reevaluation on March 28, 2016. (Prysunka Chart Note, March 21, 2016).

5) On March 28, 2016, Dr. Prysunka assessed chemical pneumonitis or acute asthmatic reaction caused by exposure to fumes at work, because Employee's symptoms started after exposures to chemicals while cleaning the ferry she worked on last October and November. Employee's milder cough and dyspnea improved but upon returning to work she was exposed to chemicals which caused a rebound in symptoms in March with increased severity. Employee's examination revealed expiratory wheezes and a non-productive cough. A pulmonary function test indicated obstructive ventilatory defect. Initially, Dr. Prysunka thought Employee's symptoms were due to an asthma exacerbation. In retrospect, Dr. Prysunka noted Employee's only other asthma-like symptoms occurred in October when she was initially exposed to chemicals at work. Dr. Prysunka continued Employee on albuterol and Flovent 44 µg. She did not release Employee to work. Employee requested to see a specialist. (Prysunka Chart Note, March 28, 2016).

6) On April 21, 2016, Employer denied all benefits contending Employee's claim is medically complex and she failed to produce medical evidence linking her employment and the medical condition and need for treatment. (Controversion Notice, April 21, 2016).

7) On April 26, 2016, Employer withdrew its April 21, 2016 controversion notice. (Withdrawal Notice, April 26, 2016).

8) On June 9, 2016, Emil Bardana, M.D., a pulmonologist, examined Employee for an Employer's Medical Evaluation (EME). Dr. Bardana diagnosed adult-onset, non-allergic, non-occupational, moderately severe bronchial asthma precipitated by acute respiratory infections, probably viral, and probable mild to moderate chronic bronchitis associated with chronic tobacco smoking. He opined Employee's employment is not the substantial cause of her need for medical treatment or disability. After reviewing the cleaning products with Employee and the industrial hygiene data, Dr. Bardana stated the medical evidence does not support the exposures

to cleaning chemicals at work as a likely contributor to Employee's ongoing asthma. He opined the substantial cause of Employee's need for treatment and disability are the recurrent respiratory infections Employee developed and her smoking history. (Bardana EME Report, June 9, 2016).

9) On June 20, 2016, Employer denied all benefits based upon Dr. Emil Bardana's EME report. (Controversion Notice, June 20, 2016).

10) On September 12, 2016, Employee filed her claim seeking permanent total disability (PTD). (Claim for Workers' Compensation Benefits, September 12, 2016).

11) On October 27, 2016, Employer deposed Dr. Prysunka. (Deposition Transcript, October 27, 2016).

12) On December 21, 2016, Employee visited Dr. Prysunka and she scheduled an appointment with the pulmonologist through Alaska Native Medical Center. (Prysunka Chart Note, December 21, 2016).

13) On December 22, 2016, the parties stipulated to an SIME and set deadlines for filing SIME medical records, SIME questions and a mutually signed SIME form. (Prehearing Conference, December 22, 2016).

14) On January 16, 2017, Employee visited Dustin McLemore, M.D., a pulmonologist, who stated:

This is a 56-year-old who comes to establish care for inhalational injury induced asthma.

According to the records and she developed asthma symptoms in March 2016 following heavy exposure to cleaning solutions while detailing the state rooms of an Alaska Marine Highway ferry. The patient works on the Alaska Marine Highway system as a cashier and occasionally cook, and in the spring of this year was assisting the crew in detailing state rooms when she was exposed to high concentrations of unspecified cleaning chemicals. Immediately after that she developed shortness of breath, wheezing, and decreased exercise tolerance. She's been treated through the last year for pneumonia at least once, and several times with steroids per her report. She is currently on Flovent 220 µg twice daily and albuterol by nebulizer or inhaler every 4 hours pretty much around the clock. [She's] doing a little bit better now but couldn't breathe at all initially in March and has had difficulty with minor activities ever since then. She's had at least 4 courses of prednisone throughout the course of this year, and was tried on Singulair, but stopped it due to some bruising lumps which appeared on her abdomen and legs, and resolved after she stopped it. She's also been tried on ipratropium, which she was unable to tolerate.

She does not smoke, and there is no smoke in her home. She does have a wood stove inside the house. She denies any history of asthma or asthmatic breathing up until this year in her life. . . .

Under “Impression and Plan,” Dr. McLemore stated:

Asthma v. Reactive airway dysfunction syndrome (RADS). Her history of exposure to cleaning chemicals followed by an acute onset of asthma is clinically very compatible with RADS. I explained to her that the natural history of this disease is often months to years prior to resolution and that in some cases it does not resolve. The cornerstones of therapy are inhaled corticosteroids and albuterol rescue inhalers, just as in ordinary asthma. I explained that she may require short courses of prednisone with flares but the goal is to use adequate controller medications to prevent systemic corticosteroids as much as possible. She will likely remain sensitive to fumes or vapors for the rest of her life and is at higher risk to have flares of her asthma. She will need to maintain fastidious avoidance of triggers and remain compliant with her inhalers.

Dr. McLemore recommended Employee use Dulera 200/5 twice per day and albuterol as needed. (McLemore Chart Note, January 16, 2017).

15) On February 10, 2017, Employee followed up with Dr. Prysunka after her visit with Dr. McLemore. Dr. Prysunka diagnosed moderate and persistent reactive airways dysfunction syndrome with acute exacerbation triggered by exposure to fumes in the workplace. Employee recently saw Dr. McLemore and he felt her history is consistent with RADS and he switched her from Flovent to Dulera and advised her to avoid further exposure to fumes. Employee briefly returned to work at the end of January and “once more she had an exacerbation of her reactive airways syndrome.” Dr. Prysunka stated Employee is not released to return to her job as further exposure could exacerbate her symptoms. (Prysunka Chart Note, February 10, 2017).

16) On April 28, 2017, the division received an SIME form signed by both parties listing a “toxicologist/occupational medicine” as the appropriate medical specialty. It listed causation, compensability, medical stability, and non-SIME issues of PPI, future medical treatment, and Employee’s ability to do any SCODRDOT job held within ten years of the [date] work injury. Dr. Prysunka’s deposition testimony and Dr. Bardana’s EME report were listed to document the disputes. (SIME Form, April 28, 2017).

17) On May 2, 2017, Employee followed up with Dr. McLemore. Dr. McLemore diagnosed reactive airway disease that was not well controlled. He noted:

The patient was last seen in January 2017, and was diagnosed with reactive airway disease secondary to possible chemical exposure from cleaning solutions.

She was discontinued on Dulera, albuterol and since that time has had at least one extreme exacerbation last week requiring a dose of IV steroids as well as multiple nebulized treatments for shortness of breath. She is currently completing [oral] steroids from her last exacerbation, and is concerned about ongoing steroid use, especially in light that she will need [atrial septal defect] repair in the future.

He recommended Employee continue with Dulera 200/5 two puffs twice per day, continue albuterol as needed, and begin Atrovent four times a day as needed. Dr. McLemore stated there is no further indication for chronic steroids and “it does appear she is improving slowly from when I first saw her. I would expect if her wheezing and [shortness of breath] are truly from RADS that it will eventually resolve with avoidance of triggers or further chemical fume exposure.” (McLemore, Chart Note, May 2, 2017).

18) On March 8, 2018, Daniel M. Raybin, M.D., F.A.C.P., examined Employee for an SIME. He opined Employee’s exposure to chemicals combined with her pre-existing asthma and was the substantial cause of her temporary disability and need for medical treatment. Employee became medically stable by June 2016, and the substantial cause of her current disability is her pre-existing asthma. Repeated viral infections during the fall-winter 2015-2016 are the substantial cause of the flare up of Employee’s asthma, which previously had been mild and intermittent. (Raybin SIME, March 8, 2018).

19) On May 29, 2018, Edward B. Holmes, M.D., a specialist in occupational medicine and toxicology, completed a records-review SIME report. He opined the employment exposures are not the substantial cause of Employee’s disability and need for medical treatment. Rather, the substantial cause of Employee’s disability and need for treatment are smoking, repeated viral illnesses, genetic pre-disposition and congenital factors. (Holmes SIME, May 29, 2018).

20) On June 11, 2018, notice of a June 26, 2018 prehearing conference was served on Employer and Employee. (Prehearing Conference Notice, July 12, 2017).

21) On June 20, 2018, Employer requested a hearing on Employee’s September 12, 2016 claim. (ARH, June 20, 2018).

22) On June 26, 2018, at a prehearing conference scheduled to discuss the SIME reports, Employee contended a hearing is not appropriate because she needs additional time for discovery. Employee stated she had a doctor’s appointment scheduled on July 9, and 13, 2018 and she expects to discuss the SIME reports with her physicians. The board designee noted date of the prehearing conference was unique because it was scheduled before Employer filed its

ARH and took place during the time period Employee had to oppose Employer's ARH in writing. The parties agreed to a prehearing conference on July 17, 2018, to discuss setting a hearing. (Prehearing Conference Summary, June 26, 2018).

23) On July 13, 2018, a division technician spoke with Employee and she stated Employer agreed to move the July 17, 2018 prehearing conference to the end of August. (Phone Call, ICERS Event Entry, July 13, 2018).

24) On July 13, 2018, Employer filed a letter stating it did not oppose rescheduling the July 17, 2018 prehearing conference but did not agree to a delay in setting a hearing date. (Letter, July 13, 2018).

25) On August 28, 2018, the parties agreed to schedule an oral hearing on Employee's September 12, 2016 claim. The parties agreed witness lists must be filed with the board and served upon all parties by October 9, 2018. (Prehearing Conference, August 28, 2018).

26) On October 8, 2018, Employee obtained a subpoena requiring Dr. McLemore to appear and testify at hearing on October 23, 2018. (Subpoena to Appear, October 8, 2018).

27) Employee's October 8, 2018 subpoena gave Dr. McLemore adequate notice. (Experience, judgment and observations).

28) On October 9, 2018, Employee filed a witness list with nine witnesses. Employee expected Dr. McLemore to testify regarding "problems [Employee] have and how fast this came on [and] expected problems in future." Employee expected Krissy Smith to testify regarding "knowing [Employee] before and after this occurrence [and] loss of abilities." Employee expected Jazmyn G. Wright to testify regarding "knowing [Employee] before [and] after [and] how this affects [Employee]." (Witness List, October 9, 2018).

29) On October 15, 2018, Rob Lynch, Senior Counsel for the Alaska Native Tribal Health Consortium filed a letter addressed to the Alaska Workers' Compensation Board stating:

I am writing on behalf of Dustin McLemore, M.D., an Alaska Native Tribal Health Consortium (ANTHC) physician and a third party to this case. ANTHC received a subpoena dated October 8, 2018 for Dr. McLemore's testimony at the Board's October 23, 2018 hearing. Dr. McLemore is unavailable to testify on that date because he has a full clinical schedule. Dr. McLemore respectfully requests a continuance of the hearing to [a] date when he is available.

I also write to note that Dr. McLemore is not a retained expert in this matter; he is merely Ms. Wright's treating physician. More to the point, Dr. McLemore is prohibited under the terms of his employment from serving as an expert witness.

ANTHC therefore objects to any attempts to solicit expert testimony from Dr. McLemore at the upcoming hearing.

Please contact the undersigned to reschedule Dr. McLemore's testimony.

The letter indicated a copy was sent to Employee and Employer's attorney. (Letter, October 15, 2018).

30) On October 15, 2018, Employer filed a hearing brief. Employer contends Employee failed to prove her employment with Employer caused her disability or current need for medical treatment by a preponderance of the evidence. Employer contends Employee's pre-existing lung condition is unrelated to her employment and is the substantial cause of her disability and need for medical treatment. (Employer Brief, October 15, 2016).

31) On October 16, 2018, Employee filed a hearing brief:

My entire life I have been an extremely active outdoors person, hiking, camping, hunting, chopping firewood, etc. I enjoy and rely on that kind of lifestyle

In March 2016, I developed a cough. I didn't feel sick but began to have difficulties breathing. I noticed it more when bending to pick things up or clean under things. I had been treated a couple times before this with antibiotics for cough even though I didn't feel sick. It was thought I had bronchitis. The antibiotics didn't work. The cough became severe pretty quickly. It was when I started to really have a hard time breathing that I decided to get off the boat and see a doctor. Once again I was put on something to control my coughing. When I came back to Wrangell and went to the clinic, I was told not to take the cough controller (tessalon), for I needed to cough this up.

After seeing a pulmonologist in Anchorage, it was decided I had reactive airway disease. . . . (Employee Hearing Brief, October 16, 2018).

32) At hearing on October 23, 2018, Employee stated Krissy Smith, and Jazmyn G. Wright were unavailable to testify for the hearing. (Record).

33) The designated chair noted Employee had not mentioned Dr. McLemore and asked Employee whether she had received the October 15, 2018 letter stating Dr. McLemore was unavailable to testify for the hearing and requesting a continuance. (*Id.*).

34) Employee testified she spoke with Mr. Lynch regarding Dr. McLemore's testimony and there was confusion about what date Dr. McLemore was expected to testify. Employee had not received the October 15, 2018 letter and was unaware Dr. McLemore was unavailable to testify. (Employee).



35) The board designee explained Employee could request a hearing continuance, waive her right to examine her witnesses and proceed without their testimony, or request the record remain open to depose her unavailable witnesses or submit affidavits from her unavailable witnesses. Employee requested a continuance of the October 23, 2018 hearing. (Record).

36) Employer objected to continuing the October 23, 2018 hearing. Employer contended good cause does not exist to continue the hearing. Employer contended Employee failed to exercise due diligence in ensuring her witnesses were available for the hearing and by failing to petition for a continuance. Employer contended Employee had the responsibility to follow up with her witnesses to ensure their availability for the hearing and she failed to do so. Employer contended Employee had sufficient time to ensure her witnesses' availability as the hearing was set on August 28, 2018. Employer contended a continuance is prejudicial to Employer as it paid for Employer's attorney to prepare for and attend the October 23, 2018 hearing in person. Employer contended a continuance denies Employer due process because Employee's claim was not heard within the time frames set under AS 23.30.110(c) and 8 AAC 45.070(c). (Record).

37) Most unrepresented claimants will not depose medical witnesses because a deposition is costly. (Observation; Inferences drawn from Experience, Judgment).

38) After the oral order issued, the parties agreed to an oral hearing date on November 27, 2018 at 10:30 a.m. (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;

(3) this chapter may not be construed by the courts in favor of a party;

(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) . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses. . . .

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).

In *Miller v. Municipality of Anchorage*, AWCB decision No. 13-0099 (August 20, 2013), the board quashed a subpoena issued only seven days before hearing to the division director. *Miller* found seven days' notice for any witness, much less a public official, is inadequate notice to subpoena a witness to testify at a hearing.

**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. . . .

**8 AAC 45.054. Discovery. . . .**

. . . .

(c) The board or division will issue subpoenas and subpoenas duces tecum accordance with 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

(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;

. . . .

(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. . . .

**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.

**8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

The Alaska Supreme Court has held that courts hold *pro se* litigants to a lesser standard than attorneys. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 795 (2002). A judge must inform a *pro se* litigant “of the proper procedure for the action he or she is obviously attempting to accomplish.” *Id* (citation omitted). Specifically, a judge must notify a *pro se* litigant of defects in his or her brief and give the party an opportunity to remedy those defects. (*Id.*).

The Alaska Supreme Court has held the board owes a duty to every claimant to fully advise him of “all the real facts” bearing upon his right to compensation and instruct him on how to pursue that right under law. *Richard v. Fireman’s Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963). In *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009), the Court held the board’s failure to correct an employer’s erroneous assertion to a self-represented claimant that his claim was already time-barred rendered the claimant’s ARH timely. Applying *Richard*, *Bohlmann* stated the board has a specific duty to inform a self-represented claimant how to preserve his claim.

ANALYSIS

**Was the oral order continuing the October 23, 2018 hearing correct?**

Hearing continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Continuances are granted for good cause. 8 AAC 45.074(b)(1)(A)-(N). Employee orally requested a continuance because several of her witnesses were unavailable to testify at hearing. A continuance may be appropriate under 8 AAC 45.074(b)(1)(A) when a material witness is unavailable on the scheduled hearing date and deposing the witness is not feasible. A continuance may also be appropriate under 8 AAC 45.074(b)(1)(N) if the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance.

Employee claims exposure to chemicals at work injured her lungs and caused her disability and need for medical treatment. Employer contends Employee's lung condition is pre-existing and unrelated to her employment. Consequently the principal dispute is whether exposure to chemicals at work is the substantial cause of Employee's disability and need for medical treatment. Employee relies on medical reports authored by Dr. Prysunka, a family practice specialist, and Dr. McLemore, a pulmonologist, for her claim. Dr. McLemore's medical reports addressed Employee's claimed chemical exposure and Employee expected him to testify about the chemical exposure and her continuing disability and need for treatment. Dr. McLemore is a material witness and he was not deposed prior to the hearing.

The legislature intended parties to have the 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. 8 AAC 45.054(a) states the party seeking to introduce a witness' testimony by deposition must pay the initial cost of the deposition. A deposition is expensive and most unrepresented claimants will not depose a witness due to the cost. *Rogers & Babler*. Dr. McLemore is not available to testify at the October 23, 2018 hearing and the October 15, 2018 letter requested a continuance. Because Employee cannot afford to depose Dr. McLemore and submit the transcript at a later date, denying Employee's request for a continuance would deprive

Employee of her right to call and examine Dr. McLemore. Therefore, failing to grant the requested continuance may result in irreparable harm to Employee.

There is no evidence Employee did not diligently pursue Dr. McLemore's appearance and testimony at the October 23, 2018 hearing. Parties have the right to request and obtain subpoenas to enforce witness participation at hearings and depositions. AS 23.30.005(h); 8 AAC 45.054(c). The October 15, 2018 letter states Dr. McLemore received a subpoena dated October 8, 2018 for the October 23, 2018 hearing. While the hearing date was set on August 28, 2018 and Employee could have served Dr. McLemore with a subpoena prior to October 8, 2018, Employee's 15 day notice to Dr. McLemore was not unreasonable. *Miller*.

Employer contends Employee's request for a hearing continuance should be denied because Employee failed to file a petition as required under 8 AAC 45.074(a). Employee served Dr. McLemore with the October 8, 2018 subpoena and spoke with Mr. Lynch. However, Employee did not receive the October 15, 2018 letter and was not aware Dr. McLemore was unavailable to testify at the hearing. Pursuant to *Richard* and *Bohlman*, the designated chair explained Employee could request a continuance, waive her right to call and examine the witnesses, or request the hearing record remain open to receive an affidavit from or deposition transcript of her witnesses, and Employee requested a continuance. Because Employee is unrepresented, she was unaware Dr. McLemore was unavailable to testify prior to the hearing, and Dr. McLemore is the pulmonologist whose medical reports Employee contends links her employment to her disability and need for medical treatment, manifest injustice would result from strict application of 8 AAC 45.074(a). *Dougan*; 8 AAC 45.195.

Employer contends a continuance would deny Employer due process and prejudice Employer. The panel acknowledges Employer incurred costs for its attorney to prepare for and attend the hearing in person and continuing the hearing delays a hearing on the merits. Employer has not shown how it would be unfairly prejudiced from continuing the merits for 35 days so Employee can present Dr. McLemore's testimony. AS 23.30.001; *Rogers & Babler*. Continuing the hearing will enable the panel to decide the case on its merits, will ensure all parties due process and an opportunity to be heard and for their arguments and evidence to be fairly considered, and

will enable the panel to best ascertain and protect all parties' rights. AS 23.30.001; AS 23.30.135.

A continuance is granted and a new hearing date will be set. AS 23.30.001; AS 23.30.135; 8 AAC 45.070(a); 8 AAC 45.074(b)(1)(A), (N). The board properly exercised its discretion in continuing the hearing to provide Employee the opportunity to call and examine Dr. McLemore. The oral order to continue the hearing was correct. The parties agreed to an oral hearing on November 27, 2018 at 10:30 a.m. to hear Employee's September 12, 2016 claim. Given the continuance granted in this case, any additional requests for a continuance must be supported by a strong showing of good cause under 8 AAC 45.074.

Employee is advised it is her responsibility to notify Dr. McLemore of the hearing's date and time so that he can arrange his schedule to be available to testify. It is also Employee's responsibility to notify her other witnesses of the hearing's date, time and location so they will be available to testify. *Richard; Bohlman.*

#### CONCLUSION OF LAW

The oral order continuing the October 23, 2018 hearing was correct.

#### ORDER

- 1) The October 23, 2018 hearing is continued
- 2) A new hearing was set for November 27, 2018 in Juneau, Alaska, at 10:30 am.

Dated in Juneau, Alaska on November 6, 2018.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kathryn Setzer, Designated Chair

\_\_\_\_\_  
/s/  
Charles Collins, Member

\_\_\_\_\_  
/s/  
Bradley Austin, 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 JANA L. WRIGHT, employee / claimant; v. STATE OF ALASKA self-insured employer, defendant; Case No. 201604175; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on November 6, 2018.

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/s/  
Dani Byers, Technician