

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

TIM KURETICH,)
)
) Employee,)
) Claimant,) FINAL DECISION AND ORDER ON
) RECONSIDERATION
)
) v.)
) AWCB Case No. 201517985
)
) HECLA MINING COMPANY,)
) AWCB Decision No. 18-0119
) Employer,)
) and) Filed with AWCB Juneau, Alaska
) on November 8, 2018
)
) AMERICAN ZURICH INSURANCE)
) COMPANY,)
)
) Insurer,)
) Defendants.)

Hecla Mining Company's (Employer) October 31, 2018 petition for reconsideration of *Kuretich v. Hecla Mining Company*, AWCB Decision No. 18-0107 (October 17, 2018) (*Kuretich I*) was heard on the written record on November 6, 2018, a date selected on November 1, 2018. The filing of Employer's petition for reconsideration gave rise to this hearing. Employer is represented by attorney Jeffrey Holloway. Tim Kuretich (Employee) is represented by Barbara Williams. The record closed at the hearing's conclusion on November 6, 2018.

ISSUES

Kuretich I denied both Employee's and Employer's September 17, 2018 petitions appealing the discovery rulings made by the Board designee at the September 5, 2018 prehearing conference. Employer contends *Kuretich I* should be reconsidered because the Board's application of AS 23.30.108 and 8 AAC 45.065 deny Employer due process. Because the deadline for the

Board to respond to a petition for reconsideration expires before the time in which Employee must respond to the petition, Employee's position is unknown, but it will be presumed Employee opposes reconsideration.

1. *Should Kuretich I be reconsidered?*
2. *Should Kuretich I be modified?*

FINDINGS OF FACT

All findings of fact in *Kuretich I* are incorporated herein by reference. The following additional facts and factual conclusions are undisputed or established by a preponderance of the evidence:

1. On May 9, 2018, Employee sent Employer an informal discovery request seeking 28 items. (*Kuretich I*).
2. On June 8, 2018, Employer filed a petition seeking a protective order from Employee's discovery requests. (*Kuretich I*).
3. At the September 5, 2018 prehearing conference, the Board designee ruled on all 28 discovery requests. Relevant here is the designee's ruling on Employee's request number 8 which sought information regarding payments Employer had made to Employee prior to the work injury. The designee's statement of the request and her ruling are:

“all records of payment of money by the employer to, or on behalf of, the employee during the 52 weeks prior to 11/17/2015, including, but not limited to, wages, health insurance, retirement benefits”: **This request is granted.** Employer is required to provide copies of payments of money by the employer to, or on behalf of, the employee during the 52 weeks prior to 11/17/2015, including, but not limited to, wages, health insurance, retirement benefits as this request is likely to provide evidence of how Employee's time loss benefits were calculated. (*Kuretich I*).
4. In its brief for the *Kuretich I* hearing, Employer contended the information was not relevant to Employee's claim as he is receiving the maximum allowable compensation rate. (Employer, Hearing Brief, October 2, 2018).
5. In its analysis of the Board designee's ruling on request number eight, *Kuretich I* stated “There is, however, no evidence that Employer made this argument to the designee at the prehearing, and it cannot be considered now.” (*Kuretich I*).

6. In its petition for reconsideration, Employer represents that it did argue to the Board designee that the information was not relevant because Employee is receiving the maximum compensation rate. (Employer, Petition for Reconsideration, October 31, 2018).
7. Employer notes that 8 AAC 45.065 only requires a “summary” be created for a prehearing conference and AS 23.30.108(c) requires the Board to review a designee’s discovery rulings based solely on the “written record.” Employer contends a “summary” is different from a “record,” and the failure to require a “record” denies it due process. (Employer, Petition for Reconsideration, October 31, 2018).

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.

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).

The board derives its authority and jurisdiction from the Alaska Workers' Compensation Act at AS 23.30.001, *et seq.* The board does not have authority to adjudicate civil, criminal, or constitutional claims. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 793 (Alaska 2002).

AS 23.30.108. Prehearings on Discovery Matters; Objections to Requests for Release of Information; Sanctions for Noncompliance.

....

(c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee, the board may not consider any evidence or argument that was not presented to the board's designee, but shall determine the issue solely on the basis of the written record. The decision by the board on a discovery dispute shall be made within 30 days. The board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

8 AAC 45.065. Prehearings. . . .

....

(c) After a prehearing the board or designee will issue a summary of the action taken at the prehearing. . . . Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. . . .

8 AAC 45.110. Record of proceedings

(a) Evidence, exhibits, or other things received in evidence at a hearing or otherwise placed in the record by board order and any thing filed in the case file established in accordance with 8 AAC 45.032 is the written record at a hearing before the board. A person may see or get a copy of the written record in accordance with this subsection and after completing and giving the division a written request, providing identification, and paying the fee, if required under 8 AAC 45.030. . . .

AS 23.30.130. Modification of awards.

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215,

whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

AS 44.62.030. Consistency between regulation and statute.

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.300. Judicial review of validity.

An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid

AS 44.62.540. Reconsideration.

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

ANALYSIS

1. Should Kuretich I be reconsidered?

Employer's contention that the application of AS 23.30.108(c) and 8 AAC 45.065, deprives it of its right to due process is a constitutional issue that the Board does not have jurisdiction to address. To the extent Employer may be contending that the application or construction of 8

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 TIM KURETICH, employee / claimant v. HECLA MINING COMPANY, employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No. 201517985; 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 8, 2018.

/s/

Dani Byers, Technician