

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JANA L. WRIGHT, )  
)  
Employee, ) FINAL DECISION AND ORDER  
Claimant, ) ON RECONSIDERATION &  
) MODIFICATION  
v. )  
) AWCB Case No. 201604175  
STATE OF ALASKA, )  
) AWCB Decision No. 19-0038  
Self-Insured Employer, )  
Defendants. ) Filed with AWCB Juneau, Alaska  
) On March 21, 2019

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Jana L. Wright's (Employee) February 28, 2019 petition for reconsideration or modification was heard on the written record on March 19, 2019 in Juneau, Alaska, a date selected on March 7, 2019. Employee's February 28, 2019 petition gave rise to this hearing. Employee represented herself. Attorney Adam Franklin represented State of Alaska (Employer). In *Jana L. Wright v. State of Alaska*, AWCB Decision No. 18-0017 (November 6, 2018) (*Wright I*), the hearing was continued as Employee's witness was unavailable. *Jana L. Wright v. State of Alaska*, AWCB Decision No. 19-0020 (February 20, 2019) (*Wright II*) held the oral order denying Employee's request to leave the hearing record open to receive additional medical evidence was correct and Employee's work for Employer is not the substantial cause of her disability and need for medical treatment. There were no witnesses and the record closed at the hearing's conclusion on March 19, 2019.

## ISSUES

Employee contends *Wright II* should be reconsidered or modified because the medical record was incomplete and she could not get testimony from physicians and witnesses.

Employer has not responded to Employee's petition. Its position is unknown; it is presumed Employer opposes Employee's petition.

**Should *Wright II* be reconsidered or modified?**

FINDINGS OF FACT

All factual findings and conclusions of *Wright II* are incorporated by reference. A preponderance of the evidences establishes the following facts and factual conclusions:

- 1) On October 26, 2016, Employer deposed Lynn E. Prysunka, M.D. (Prysunka Deposition Transcript, October 27, 2016).
- 2) 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. The board designee set October 3, 2018 as the hearing evidence deadline and informed the parties medical documents must be filed and served with a medical summary form. Medical documents already filed and served on all parties with a medical summary form do not need to be re-filed and re-served. The board designee included a copy of a medical summary form with the prehearing conference summary for Employee. (Prehearing Conference Summary, August 28, 2018; Prehearing Conference Summary Served Event, August 28, 2018).
- 3) On October 9, 2018, Employee filed a witness list containing nine witnesses, including Dustin McLemore, M.D., Dr. Prysunka, Brian Baehr, and Kitty Angerman. (Employee Witness List, October 9, 2018).
- 4) On November 6, 2018, *Wright I* issued. It held the oral order continuing the October 23, 2018 hearing was correct because Employee's witness, Dr. McLemore, was unavailable for hearing. Employee was advised it is her responsibility to notify her witnesses, including Dr. McLemore, of the hearing date, time and location so they will be available to testify. (*Wright I*).
- 5) On November 28, 2018, Employee was properly served with notice of the January 22, 2019 hearing. (Hearing Notice Served, November 28, 2018; Observation).
- 6) On January 22, 2019, at hearing in *Wright II*, witnesses included Brian Baehr and Kitty Angerman who testified telephonically for Employee. (*Wright II*).

7) On February 20, 2019, *Wright II* issued. It held the oral order denying Employee's request to leave the hearing record open to receive additional medical evidence was correct and Employee's work for Employer is not the substantial cause of her disability and need for medical treatment. *Wright II* found it was unclear which medical evidence Employee contended was missing from the medial record, Employee was properly informed of the hearing evidence deadline, her testimony she was unfamiliar with her responsibility to file evidence by the hearing evidence deadline was not credible and her delay in filing medical evidence was not minimal. It also found good cause did not exist to continue the hearing for additional evidence because Employee had adequate time to prepare for hearing and file and serve evidence, did not exercise due diligence in filing and serving evidence and provided no reason why the additional medical evidence could not have been obtained and filed earlier. *Wright II* found Employee was provided a reasonable opportunity to present evidence and allowing Employee to file additional medical evidence she failed to file without providing any reason for the failure would prejudice Employer and deny it due process. (*Wright II*).

8) On February 28, 2019, Employee timely filed a petition requesting reconsideration or modification stating, "Not all documents were submitted. (medical). Could not get testimony from doctors and witnesses." (Petition, February 28, 2019).

9) Employee attached no medical documents, newly discovered or otherwise, nor a memorandum specifying a change in condition, or detailing any mistakes in factual determinations in *Wright II*. (Observation).

#### 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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(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 23.30.110. Procedure on claims. . . .**

. . . .

(c) . . . The board shall give each party at least 10 days’ notice of the hearing, either personally or by certified mail. . . .

**AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year . . . whether or not a compensation order has been issued . . . 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. . . . For an alleged factual mistake, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. Modification under AS 23.30.130(a) “is not appropriate when a party is seeking to” change the result of a decision “based on an allegation that the board committed a mistake of law.” *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743-44 (Alaska 2005).

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**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. . . . AS 44.62.540 limits authority to reconsider and correct a decision under this section to 30 days. The appropriate recourse “for allegations of legal error” is a direct appeal or petition to the board for reconsideration of the decision under AS 44.62.540(a). *Lindekugel*, 117 P.3d at 743, n. 36, 744 (Alaska 2005).

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**8 AAC 45.060. Service.**

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(b) . . . . Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. . . .

**8 AAC 45.120. Evidence.**

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

(1) to call and examine witnesses;

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**8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.

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(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

(2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification. . . .

ANALYSIS

**Should *Wright II* be reconsidered or modified?**

Petitioner timely requested reconsideration. AS 44.62.540; 8 AAC 45.060(b); 8 AAC 45.063(a). Petitions requesting reconsideration are used to raise legal errors. *Lindekugel*. Employee contends *Wright II* erred because she “could not get testimony from physicians and witnesses.” Parties must be afforded due process and a reasonable opportunity to be heard and for their arguments and evidence to be fairly considered. AS 23.30.001(4). Two of her witnesses testified at the January 22, 2019 hearing; Dr. Prysunka testified at her deposition and her testimony was considered. The first hearing on October 23, 2018, was continued because her witness, Dr. McLemore, was unavailable and *Wright I* held the oral order continuing the October 23, 2018 hearing was correct. On November 6, 2018, 77 days before the January 22, 2019 hearing, Employee was properly advised it was her responsibility to notify her witnesses of the hearing date, time and location so they will be available to testify. On November 28, 2018, Employee was properly served with the January 22, 2019 hearing notice, providing her 55 days’ notice of the hearing. AS 23.30.110(c); 8 AAC 45.060(b). Employee had adequate time to prepare for hearing and notify her witnesses of the January 22, 2019 hearing date, time and location so they would be available to testify. Employee was provided reasonable time to call and examine witnesses for the January 22, 2019 hearing. AS 23.30.001(4); 8 AAC 45.120(c)(1). Hearings in workers’ compensation cases shall be impartial and fair to all parties. AS 23.30.001(4). Reconsidering *Wright II* to allow Employee additional time to call and examine witnesses when she has been provided a reasonable time to do so will prejudice Employer and deny it due process. *Id.* Therefore, *Wright II* did not err because Employee “could not get testimony from physicians and witnesses.”

Employee also contends *Wright II* erred because not all of the medical documents were submitted. This is the same argument offered by Employee at hearing on January 22, 2019. *Wright II* weighed the parties due process rights under AS 23.30.001(4) and held the oral order denying Employee's request to leave the hearing record open to receive additional medical evidence was correct. Employee offers no new legal argument supporting her contention *Wright II* made a legal error because not all of the medical documents were submitted. Therefore, her petition for reconsideration will be denied.

Parties have up to one year following a decision to request modification based on a factual error. AS 23.30.130; *Lindekugel*. Thus, Petitioner's undated petition filed on February 28, 2019, was timely. It is not clear whether Employee intended to seek modification based on a change in condition or a mistake in *Wright II*'s factual findings. Modification is used if a party alleges a change in condition or a factual error. *Lindekugel*. Employee contends *Wright II* erred because medical records were not filed. Yet she failed to file the medical documents she contends are not in the record with her petition. Nor has she identified what medical reports already in the record were not considered in *Wright II*. Employee failed to provide with specificity and in detail the claim history, any changes conditions, facts upon which the original award was based and any facts alleged to be erroneous. She failed to detail the effect of any alleged changed conditions or factual-findings mistakes would have upon *Wright II*. Employee's petition is a bare allegation and simply restates hearing arguments without details sufficient to permit review. 8 AAC 45.150(c), (d), (e). Employee's petition for modification will be denied.

#### CONCLUSIONS OF LAW

*Wright II* will not be reconsidered or modified.

#### ORDER

1) Employee's February 28, 2019 petition is denied.





CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Jana L. Wright, employee / claimant v. State of Alaska, employer; self-insurer / defendants; 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 March 21, 2019.

/s/

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Dani Byers, Technician