

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

IN THE MATTER OF THE PETITION)
FOR A FINDING OF THE FAILURE TO)
INSURE WORKERS' COMPENSATION) FINAL DECISION AND ORDER
LIABILITY, AND ASSESSMENT) ON RECONSIDERATION &
OF A CIVIL PENALTY AGAINST,) MODIFICATION
)
HEATHER SCHNELL DBA CERTIFIED) AWCB Case No. 700006723
ROOFING,)
) AWCB Decision No. 19-0059
Respondent,)
Petitioner.) Filed with AWCB Anchorage, Alaska
) On May 10, 2019
)
_____)

Heather Schnell's doing business as Certified Roofing (Employer) April 18, 2019 petition for reconsideration or modification of *In re Heather Schnell dba Certified Roofing*, AWCB Decision No. 19-0049 (April 15, 2019) (*Schnell I*) was heard on the written record on May 9, 2019 in Anchorage, Alaska, a date selected on May 8, 2019. A petition gave rise to this hearing. Investigator Douglas Love represented the Workers' Compensation Special Investigations Unit (SIU). Heather Schnell represented Employer. The record closed at the hearing's conclusion on May 9, 2019.

ISSUE

Employer contends *Schnell I* should be reconsidered or modified because it was based on incorrect information and dates. It contends it was unable to obtain the correct information necessary for its defense prior to the hearing.

SIU opposes Employer's petition contending it was provided reasonable opportunity to submit evidence and argument for the written record hearing and it failed to file any evidence in support of the petition.

Should *Schnell I* be reconsidered or modified?

FINDINGS OF FACT

A preponderance of the evidences establishes the following facts and factual conclusions:

- 1) On September 20, 2018, the SIU filed an amended petition contending Employer failed to insure against workers' compensation liability and requesting imposition of a penalty along with a discovery demand. It contended Employer failed to insure from November 30, 2013 through July 28, 2014, from July 29, 2015 through April 17, 2018, and from June 19, 2018 to a date to be determined later when Employer becomes insured. (*Schnell I*).
- 2) On January 18, 2019, the parties stipulated to a hearing on the written record on February 27, 2019 and to file and serve hearing briefs by February 20, 2019 and evidence by February 7, 2019. (*Schnell I*).
- 3) On March 8, 2019, the division sent the parties a letter explaining after review of the record, it was discovered a formal notice of a hearing on the written record was not served on the SIU or Employer. It continued the written hearing until March 19, 2019. (*Id.*).
- 4) On March 8, 2019, the division served both parties formal notice of the March 19, 2019 written record hearing by certified mail, return receipt requested. (*Id.*).
- 5) On March 14, 2019, Employer received the March 19, 2019 written record hearing notice. (*Id.*).
- 6) Employer failed to file evidence or a hearing brief. (Record).
- 7) On April 15, 2019, *Schnell I* issued and granted SIU's petition finding Employer was uninsured from July 30, 2015 through April 17, 2018 and from June 19, 2018 through September 15, 2018 and assessed a civil penalty of \$120,000.00. (*Schnell I*).
- 8) On April 18, 2019, Employer timely filed a petition requesting reconsideration or modification of *Schnell I* contending it was based on "incorrect information and dates" and it was "unable to get this information to the current individuals before hearing was held." (Petition, April 18, 2019).

9) Employer attached no evidence, newly discovered or otherwise, to its April 18, 2019 petition, nor did it include a memorandum specifying a change in condition or detailing any mistakes in factual determinations in *Schnell I*. (Observation).

10) On April 22, 2019, SIU opposed Employer's April 18, 2019 petition contending Employer failed to file a hearing brief, failed to inform the division or SIU it needed additional time to gather or provide evidence, failed to request a continuance and failed to file any evidence in support of the April 18, 2019 petition. SIU contended there was no mistake of fact or law in *Schnell I* and granting reconsideration would unfairly prejudice SIU and reward Employer for its lack of participation. (SIU Opposition, April 22, 2019).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

....

(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).

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* at 743, n. 36.

8 AAC 45.060. Service.

. . . .

(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 45.074. Continuances and cancellations

. . . .

(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

. . . .

(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;

. . . .

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.

....

(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 *Schnell I* 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*. Employer contends *Schnell I* erred because was based on incorrect information and dates and it was unable to obtain the information before the March 19, 2019 written record hearing. 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). On January 18, 2019, Employer agreed to a February 27, 2019

written record hearing and for evidence to be filed on or before February 7, 2019 and for hearing briefs to be filed on or before February 20, 2019. On March 8, 2019, the division continued the hearing until March 19, 2019 because formal notice of the written record hearing was not served on either SIU or Employer. Employer was properly served with the March 19, 2019 hearing notice, providing 11 days' notice of the hearing. AS 23.30.110(c); 8 AAC 45.060(b). Employer was provided reasonable time to submit evidence and argument for the written record March 19, 2019 hearing. AS 23.30.001(4); 8 AAC 45.120(c)(1). Furthermore, Employer failed to request a continuance of the March 19, 2019 written record hearing. Continuances are not favored and may only be granted for good cause circumstances. 8 AAC 45.074(b). Employer failed to explain why, with due diligence, it was unable to "get this information" before and produce it for the March 19, 2019 written record hearing and how irreparable harm resulted. 8 AAC 45.074(b)(N). *Schnell I* did not err because Employer did not obtain and produce evidence before the March 19, 2019 written record hearing.

Parties have up to one year following a decision to request modification based on factual error. AS 23.30.130; *Lindekugel*. Therefore, Petitioner's April 18, 2019 petition was timely. Modification is used if a party alleges a change in condition or a factual error. *Lindekugel*. Employer contends *Schnell I* erred because it was based on incorrect information and dates and it was unable to obtain the information before the written record hearing was held. Yet Employer failed to file the information with its petition. Nor has it identified what information was not considered. Employer also failed to provide with specificity and in detail the petition history, any changes in conditions, facts upon which the original order was based and any facts alleged to be erroneous. It failed to detail the effect of any alleged changed conditions or factual-finding mistakes would have upon *Schnell I*. Employer's petition is a bare allegation and simply contends the finding of failure to insure and assessed civil penalty was based on incorrect information it was unable to obtain before the March 19, 2019 written record hearing without details sufficient to permit review. 8 AAC 45.150(c), (d), (e). Employer's petition for modification will be denied.

CONCLUSIONS OF LAW

Schnell I will not be reconsidered or modified.

ORDER

1) Employer's April 18, 2019 petition is denied.

Dated in Anchorage, Alaska on May 10, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Kathryn Setzer, Designated Chair

/s/

Rick Traini, 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 Heather Schnell and Heather Schnell DBA Certified Roofing; Employer; Respondent, Petitioner; Case No. 700006723; 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 May 10, 2019.

/s/
Nenita Farmer, Office Assistant