

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

GIOVONNA MARIA MILLS,)
)
Employee,)
)
and) INTERLOCUTORY
) DECISION AND ORDER
)
PROVIDENCE SURGERY CENTERS,) AWCB Case No. 201706421
LLC d/b/a CREEKSIDE SURGERY)
CENTER) AWCB Decision No. 19-0073
)
Claimant,) Filed with AWCB Anchorage, Alaska
) on June 02, 2019
)
v.)
)
STATE OF ALASKA,)
)
Self-Insured Employer,)
)
Defendants.)

The State of Alaska's April 9, 2019 petition to bifurcate hearing issues and Creekside Surgery Center's June 4, 2019 petition to continue the hearing were heard in Anchorage, Alaska on June 5, 2019, a date selected on May 8, 2019. The parties' oral agreement gave rise to this hearing. Giovonna Maria Mills (Employee) was contacted telephonically, but elected not to participate in the hearing. Kylie Kaczor appeared on behalf of Providence Surgery Centers, LLC, d/b/a Creekside Surgery Center (Creekside). Assistant Attorney General, Adam Franklin, appeared and represented State of Alaska. The record closed at the hearing's conclusion on June 5, 2019.

ISSUES

Creekside filed a claim for medical benefits, contending it had been underpaid according to the Alaska Medical Fee Schedule. Employer answered, contending both that Creekside had been

properly paid under the fee schedule and that its claim was untimely. Employer subsequently filed a petition to bifurcate the fee schedule question from the timeliness question. Shortly before the June 5, 2019 hearing, Creekside filed a petition to continue the hearing.

Creekside contended a hearing on all issues should be continued to allow it to obtain an attorney. Employer contended Creekside had ample opportunity to obtain an attorney and particularly opposes a continuance on the bifurcation issue. After deliberations, the hearing panel granted Creekside's petition as to the timeliness and fee schedule issues, but denied it as to the bifurcation issue.

1) Was the oral ruling on Creekside's petition for a continuance correct?

Employer contends the timeliness issue is simpler and requires less evidence, and if it prevails on that issue, the more complex fee schedule issue need not be addressed. Creekside opposes bifurcation contending it should be granted time to obtain an attorney before proceeding.

2) Should the timeliness issue and the fee schedule issue be bifurcated for hearing?

FINDINGS OF FACT

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

- 1) On January 17, 2017, Employee injured her knee while working for Employer. (Report of Injury, May 2, 2017).
- 2) On August 24, 2017, surgery on Employee's right knee was performed at Creekside, an ambulatory surgery center. (Creekside, Operative Report, August 24, 2017; Kaczor).
- 3) On March 18, 2019, Creekside filed a claim for medical costs related to the August 24, 2017 surgery, contending it had been underpaid according to the 2017 Alaska Workers' Compensation Medical Fee Schedule. (Claim, March 18, 2019).
- 4) On April 5, 2019, Employer filed its answer to Creekside's claim. Employer contended Creekside had been properly paid according to the fee schedule and that Creekside had not timely filed its claim. (Employer, Answer, April 5, 2019).
- 5) On April 5, 2019, Employer also filed a petition seeking to bifurcate the fee schedule issue and the timeliness issue for hearing. (Employer, Petition, April 5, 2019).

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- 6) At the May 8, 2019 prehearing conference, the Board designee (designee) set a hearing for June 5, 2019, and identified the issue as “Petition to Bifurcate Timeliness Issue.” (Prehearing Conference Summary, May 8, 2019).
- 7) On May 15, 2019, the designee who had conducted the May 8, 2019 prehearing conference retired. (Observation).
- 8) On May 16, 2015, Employer asked that the prehearing conference summary be modified. Employer stated the designee had granted the petition to bifurcate at the prehearing, and the issue for hearing should have been whether Creekside’s claim was timely filed. (Employer, Request to Modify Prehearing Summary, May 16, 2019).
- 9) Because the designee who had conducted the May 8, 2019 prehearing no longer worked for the division, no action was taken on Employer’s request to modify the prehearing conference summary. (Record, Observation).
- 10) On May 28, 2019, Employer filed its brief for the June 5, 2019 hearing. In its brief, Employer argued Creekside’s claim should be dismissed because it was untimely, citing several Alaska Supreme Court decisions addressing statutory construction. (Employer, Hearing Brief, May 28, 2019).
- 11) On June 4, 2019, Creekside filed a petition seeking to continue the June 5, 2019 hearing. Creekside stated that based on the legal arguments in Employer’s hearing brief it believed it needed legal counsel to represent it at the hearing. (Petition, June 4, 2019).
- 12) The first issue addressed at the June 5, 2019 hearing was Creekside’s petition for a continuance. The designated chair explained that whether or not a continuance was appropriate depended on the issues that would be heard. The designated chair explained that under 8 AAC 45.070(f) the prehearing conference summary controlled the issue for hearing unless the parties agreed otherwise. (Record).
- 13) Creekside contended a continuance was appropriate; when it reviewed Employer’s hearing brief, it realized the issue was not just factual, but legal as well. Creekside requested the entire hearing be continued, including the question of bifurcation. Employer contended the parties had agreed to bifurcate the issue at the prehearing, and the hearing should address the timeliness question. Employer also contended Creekside had had adequate time to obtain an attorney, and a last minute continuance would prejudice Employer. If the hearing was limited to the bifurcation issue, Employer asked that its petition to bifurcate be granted. (Record).

14) Fee schedule issues are complex, and often require expert witnesses; timeliness issues are generally factually straightforward and less complex. (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;
- 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).

AS 23.30.095. Medical treatments, services, and examinations.

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits.

AS 23.30.097. Fees for medical treatment and services.

(a) All fees and other charges for medical treatment or service are subject to regulation by the board consistent with this section. A fee or other charge for medical treatment or service

(1) rendered in the state may not exceed the lowest of

(A) the usual, customary, and reasonable fees for the treatment or service in the community in which it is rendered, for treatment or service provided on or after December 31, 2010, not to exceed the fees or other charges as specified in the fee schedules established by the medical services review committee and adopted by the board in regulation; the fee schedules must include

....

(ii) an outpatient and ambulatory surgical center fee schedule based on the federal Centers for Medicare and Medicaid Services' ambulatory payment classification; . . .

....

(i) A provider whose bill has been denied or reduced by the employer may file an appeal with the board within 60 days after receiving notice of the denial or reduction. A provider who fails to file an appeal of a denial or reduction of a bill within the 60-day period waives the right to contest the denial or reduction.

AS 23.30.135. Procedure before the board.

(a) 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 45.074. 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;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

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(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(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;

Although the Board is generally disinclined to hear a case on an issue-by-issue basis, in many cases the quick, efficient, fair, and reasonable cost goals of AS 23.30.001(4) are best served by deciding determinative issues before a hearing on the merits of an employee's claim. For example, *Adams v. O&M Enterprises and Michael A. Heath Trust*, AWCB Decision 15-0039 (April 6, 2015) ordered that a hearing on the issue of whether the claimant was the employer's employee be held before a hearing on the merits of the claimant's claim.

ANALYSIS

1) Was the oral ruling on Creekside's petition for a continuance correct?

Creekside contended the hearing should be continued as to all issues. After receiving Employer's hearing brief, which addressed the timeliness issue, Creekside recognized it needed an attorney's assistance. Employer contended the hearing should not be continued because Creekside had ample time to obtain an attorney had it been diligent. Employer asked that if the timeliness issue was continued, the bifurcation issue be addressed.

Here, the confusion resulting from the prehearing conference summary and Creekside's realization that the timeliness issue was legally more complex than it had understood warranted a continuance as to the timeliness issue. Although Employer contends Creekside's failure to obtain an attorney earlier shows a lack of diligence, while Creekside may have misapprehended the legal complexity of the timeliness issue, it acted promptly once it realized it needed an attorney. Creekside exercised due diligence, and irreparable harm could have resulted if the continuance was not granted. A continuance of the timeliness issue is appropriate under 8 AAC 45.074(b)(1)(N), and the oral ruling was correct.

2) Should the timeliness issue and the fee schedule issue be bifurcated for hearing?

Creekside opposed bifurcation until it obtains an attorney. Bifurcation, however, will not affect Creekside's claim or legal rights. The timeliness issue is significantly less complex legally and factually than the fee schedule issue, and the issue will have to be addressed, either in a separate hearing or together with the fee schedule issue. The timeliness issue may be determinative – should Employer prevail, there would be no need to address the fee schedule issue. If the issues are bifurcated, the parties will need to prepare for a hearing on the more complex fee schedule issue only if Creekside prevails on the timeliness issue, possibly reducing time and cost for both parties. Employer's petition to bifurcate the timeliness and fee schedule issues will be granted.

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 GIOVONNA MARIA MILLS, employee, and CREEKSIDE SURGERY CENTER, claimant, v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201706421; 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 July 02, 2019.

/s/

Charlotte Corriveau, Office Assistant