

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

EZZELDIN ELATTAR,)	
)	
Employee, and)	
)	
ALAN MILLER, Guardian & Conservator)	FINAL
for Employee,)	DECISION AND ORDER
)	ON RECONSIDERATION
v.)	
)	AWCB Case No. 201816325
LXS CARPENTRY, LLC,)	
)	AWCB Decision No. 20-0014
Employer, and)	
)	Filed with AWCB Anchorage, Alaska
ALASKA WORKERS' COMPENSATION)	on March 17, 2020
BENEFIT GUARANTY FUND,)	
)	
Fund.)	
)	

Ezzeldin Elattar’s (Employee) December 6, 2019 petition through Alan Miller, (Guardian) for reconsideration of *Elattar v. LXS Carpentry, LLC*, AWCB Decision No. 19-0123 (November 27, 2019) (*Elattar I*) was initially heard on the written record on December 18, 2019, in Anchorage, Alaska, a date selected on that day. Because the time to reconsider *Elattar I* would have expired before the parties’ time ran out to answer the petition, *Elattar v. LXS Carpentry, LLC*, AWCB Decision No. 19-0134 (December 19, 2019) (*Elattar II*) granted reconsideration solely to “allow for the parties’ responses” to the petition. (*Elattar II* at 3). No party answered Employee’s December 6, 2019 petition within the 23 days allocated (20 days plus three days added to account for service by mail), in the administrative regulations to answer a petition.

On February 24, 2020, the panel chair asked the parties if there were any reasons why Employee's December 6, 2019 petition should not now be decided. On February 26, 2020, Employee through Guardian said he saw no reason to delay decision on his December 6, 2019 petition to reconsider *Elattar I*. On February 26, 2020, the contractor-over Gallo, d/b/a Diamond Construction (Diamond) stated it had not received *Elattar II* and requested additional time to respond to Employee's December 6, 2019 petition. On February 27, 2020, the panel chair invited the parties' responses to Diamond's request for more time to answer. On February 27, 2020, Employee through Guardian opposed Diamond's request for additional time. On February 28, 2020, Diamond petitioned for an extension of time until March 6, 2020, to answer the December 6, 2019 petition. On March 3, 2020, Employee through Guardian answered and objected to Diamond's petition for more time to answer the petition. On March 5, 2020, the division set a March 17, 2020 written record hearing on Employee's December 6, 2019 petition. On March 6, 2020, Diamond answered the petition. This decision addresses Employee's December 6, 2019 petition on its merits. Attorney Robert Bredesen represents Employee's Guardian. Non-attorney Alexis Zaitsev represents LXS Carpentry, LLC (Employer). Attorney Nora Barlow represents Diamond. Attorney William Wuestenfeld represents Diamond's insurer Alaska National Insurance Company. Assistant Attorney General Rebecca Hattan represents the Alaska Workers' Compensation Benefit Guaranty Fund (Fund). As this was a written record hearing, there were no witnesses. The record closed at the hearing's conclusion on March 17, 2020.

ISSUE

Employee contends *Elattar I* justifiably awarded various penalties. However, he contends the additional award "penalty" *Elattar I* awarded under AS 23.30.070(f) should have been awarded to him or to Guardian rather than to Employee's medical providers.

Diamond contends AS 23.30.070(f) should be read consistent with the Act, which requires penalties be paid directly "to the recipient to whom the unpaid installment was to be paid." Reading the Act in this fashion, Diamond contends *Elattar I* correctly awarded the §070(f) additional award "penalty" to Employee's medical providers.

No other party has responded to Employee's December 6, 2019 petition. Therefore, their positions on the petition are unknown.

Should Employee's December 6, 2019 petition for reconsideration of *Elattar I* be granted?

FINDINGS OF FACT

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

1) On October 24, 2019, a panel heard Employee's and Guardian's November 6, 2018 claim against defendant LXS Carpentry, LLC, now referred to as "Employer." Among the issues was Employee's request for a 20 percent additional award penalty against Employer under AS 23.30.070(f). (*Elattar I*).

2) On November 27, 2019, *Elattar I* held respecting the §070(f) additional award "penalty" issue:

[Employer] first knew Elattar fell on the injury date, because Hernandez, [Employer's] agent in charge at the time, saw him fall. It also knew when Haworth interviewed Zaitsev on July 24, 2018. [Employer] did not timely file and serve an injury report . . . and has never paid any benefits to Elattar or on his behalf. AS 23.30.070(a). . . . [Employee and Guardian] seek two penalties: One for [Employer's] failure to timely file an injury report. . . . AS 23.30.070(f). . . . Though [Employer] may have questioned the employee-employee relationship, nothing prevented Zaitsev from timely filing an injury report while also offering the defenses raised in his November 17, 2018 letter. Therefore, because [Employer] never filed an injury report, it will be ordered to pay an additional award equal to 20 percent of all amounts unpaid when due, including medical and indemnity. AS 23.30.070(f).

3) Based on the above analysis, *Elattar I* ordered:

5) Defendant shall pay to Miller on Elattar's behalf as his guardian and conservator and to Elattar's medical providers a 20 percent statutory penalty under AS 23.30.070(f). . . .

4) On December 6, 2019, Employee through Guardian timely asked for an order reconsidering *Elattar I* on a limited issue; they contend the AS 23.30.070(f) additional award "penalty" assessed in *Elattar I* should have been awarded to Employee or Guardian on Employee's behalf rather than to his medical providers. They contend the "the employee or the legal representative of the employee or other person entitled to compensation" was meant to include employees, guardians, widows, widowers and children but "not medical providers." Guardian makes a distinction

between penalties awardable under §070(f) and AS 23.30.155(e). He concedes penalties awarded under §155(e) on late or unpaid medical benefits must be awarded to the medical providers. However, he contends §070(f) provides an option to award additional award “penalties” under §070(f) to “the employee or the legal representative of the employee or other person entitled to compensation.” Guardian contends the legislature amended prior §070(f) and added discretionary language to “protect severely injured workers and their families.” He contends Employee’s family “needs the money [awarded under §070(f)] and the medical providers do not.” Guardian seeks an order reconsidering *Elattar I* and directing all 20 percent additional award “penalties” awarded in it under §070(f) paid to Employee or Guardian on his behalf. (Guardian’s Petition for Reconsideration, December 6, 2019).

5) On March 6, 2020, Diamond responded to Employee’s December 6, 2019 petition for reconsideration. It contends §070(f) should be read consistent with other Act provisions, presumably including §155(e), which requires “penalties” under that section to be paid to the medical provider entitled to the unpaid medical expense. Diamond also distinguished Alaska Supreme Court precedent Employee had relied upon to support his position and, given these contentions, asked that Employee’s petition for reconsideration be denied. (General Contractor and Its Insurer’s Response to Petition for Reconsideration, March 6, 2020).

6) No other party responded to Employee’s December 6, 2019 petition for reconsideration. (Agency file).

7) Miller as Employee’s guardian and conservator is his “legal representative.” (Experience, judgment, and inferences drawn from the above).

PRINCIPLES OF LAW

AS 23.30.070. Report of injury to division. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall file with the division a report setting out. . . .

. . . .

(f) An employer who fails or refuses to file a report required of the employer by this section or who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee or the legal representative of the employee or other person entitled to compensation by

reason of the employee's injury or death an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

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.

The Alaska Supreme Court in *Burke v. Raven Electric, Inc.*, 420 P.3d 1196, 1208 (Alaska 2018), stated, "We consider all parts of the statute together and presume the legislature is aware of other statutory sections on the same subject as well as prior cases when enacting legislation."

ANALYSIS

Should Employee's December 6, 2019 petition for reconsideration of *Elattar I* be granted?

Elattar I awarded Employee's medical providers a 20 percent "penalty" on all work-related medical bills that were unpaid when due. AS 23.30.070(a), (f). Employee through Guardian timely requested reconsideration. AS 44.52.540(a). Employee and Guardian contend §070(f) was not intended to provide additional compensation to medical providers. They contend this section is designed to benefit injured workers and their families by providing additional compensation directly to them. Diamond contends medical providers are also an "other person entitled to compensation" and *Elattar I* was right to award the §070(f) additional award "penalty" to Employee's medical providers. This issue is a legal question.

Employee correctly notes that §070(f) and §155(e) are distinctly different statutes. The former awards discretionary additional compensation, while the latter mandates additional compensation

in applicable circumstances. Further, §070(f) presents options to whom the additional compensation may be awarded, while §155(e) specifies the additional amount “shall be paid directly to the recipient to whom the unpaid installment was to be paid.” The current §155(e) was amended effective 2005 when the legislature added “shall be paid directly to the recipient to whom the unpaid installment was to be paid.” Notably, the legislature in 2005 or thereafter did not similarly amend §070(f). The legislature is presumed to know about all statutes on the same issue when it amends a provision. *Burke*. Had the legislature wanted to change §070(f) to conform with §155(e) on this issue, it could have, but it did not.

Employee incorrectly contends, a medical provider cannot be considered a “person entitled to compensation.” Clearly they can be; both parties agree medical benefits are subject to “penalty” assessment under both §070(f) and §155(e). Diamond does not expressly mention §155(e) in its briefing but contends §070(f) should be read consistent with the Act, which in other places requires penalties be paid to the person entitled to the compensation, in this case the medical providers. The other Act provision, to which Diamond presumably refers, is §155(e), which indeed requires “additional amounts” commonly called “penalties” be paid directly to the parties entitled to the benefits at issue. But Diamond’s argument ignores the differences in the two statutes, §070(f) and §155(e), discussed above. Employee’s legal argument is correct: *Elattar I* could award the additional amounts under §070(f) to at least three categories of approved recipients.

Elattar I made a legal error in assuming and deciding that only a medical provider could receive additional amounts awarded under §070(f), as is the case with additional amounts awarded under §155(e). Who should get this §070(f) additional compensation is the remaining question. Both parties support their positions with conclusory contentions: Employee and Guardian contend they should obtain the additional §070(f) award because they need it more for family financial support than do medical providers; Diamond contends medical providers are people too who should receive the additional §070(f) award because they get other additional awards provided for in other Act sections. On balance, Employee’s argument is more compelling. With due respect to Employee’s medical providers who, as applicable, are already entitled to a 25 percent “penalty” under §155(e), it is likely Guardian, on Employee’s behalf as his “legal representative,” can put the 20 percent §070(f) additional award “penalty” on applicable medical benefits to good use to

benefit Employee and his family. Since “legal representative” is one entity to which this additional amount may be awarded, Employee’s December 6, 2019 petition for reconsideration will be granted, and the order will be revised to reflect this decision. AS 44.52.540(b).

CONCLUSION OF LAW

Employee’s December 6, 2019 petition for reconsideration of *Elattar I* will be granted.

ORDER

- 1) Employee’s December 6, 2019 petition for reconsideration of *Elattar I* is granted.
- 2) Order “5)” from *Elattar I* is reconsidered, deleted and reworded as follows: “5) Employer shall pay to Miller on Elattar’s behalf as his guardian and conservator a 20 percent statutory additional award “penalty” under AS 23.30.070(f) on all benefits under the Act that were not paid within 14 days of their due date, including medical benefits, in accordance with this decision, the Act and applicable regulations. Employer shall also pay to Miller on Elattar’s behalf as his guardian and conservator a 25 percent statutory additional award “penalty” under AS 23.30.155(e) on all non-medical benefits, and to Elattar’s medical providers a 25 percent statutory additional award “penalty” under AS 23.30.155(e) on all work-related medical benefits under the Act that were not paid within 14 days of their due date, all in accordance with this decision, the Act and applicable regulations.”

Dated in Anchorage, Alaska on March 17, 2020.

ALASKA WORKERS’ COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Robert C. Weel, Member

_____/s/
Justin Mack, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 on Reconsideration in the matter of Ezzeldin Elattar, employee v. LXS Carpentry, LLC, employer; Alaska Workers' Compensation Benefits Guaranty Fund, insurer / defendants; Case No. 201816325; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 17, 2020.

/s/
Nenita Farmer, Office Assistant