

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MINDI JOHNSON,)
)
Employee,) INTERLOCUTORY
Claimant,) DECISION AND ORDER
)
v.) AWCB Case No. 201415623
)
ALASKA COURT SYSTEM,) AWCB Decision No. 20-0061
)
Self-insured Employer,) Filed with AWCB Anchorage, Alaska
Defendant.) on July 22, 2020
)
_____)

Mindi Johnson's (Employee) April 2, 2020 petition for a hearing continuance was heard on July 21, 2020, in Anchorage, Alaska, a date selected on May 21, 2020. The parties' May 21, 2020 stipulation gave rise to the hearing. Employee, a non-attorney, appeared by telephone, testified and represented herself. Assistant Attorney-General Henry Tashjian appeared by telephone and represented the Alaska Court System (Employer). The record closed at the hearing's conclusion on July 21, 2020.

ISSUE

As a preliminary matter, Employee requested a hearing continuance. She cited difficulties with finding counsel and preparing for a hearing due to restrictions related to the Covid-19 pandemic.

Employer objected to a continuance. It contended there is no basis to continue a hearing simply because a party is not represented. An oral order granted Employee's request.

Was the oral order continuing the hearing correct?

FINDINGS OF FACT

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

- 1) On June 15, 2015, Employer denied Employee's right to all benefits based on an opinion from Bret Mason, D.O. (Controversion Notice, June 11, 2015).
- 2) On April 15, 2016, Employee claimed a September 22, 2014 injury and said her pain started when her workstation was "broken down and relocated." The injury affected her bilateral hands, wrists, arms and shoulders and she had burning, pain and swelling. She filed a claim because she disagreed with Employer's controversion. (Workers' Compensation Claim, April 13, 2016).
- 3) On August 24, 2016, Employee requested that Employer's controversion be reconsidered and her case reopened to allow long-term treatment to continue. The unsigned and undated claim amended her April 13, 2016 claim. (Workers' Compensation Claim, undated).
- 4) On September 2, 2016, Employee signed, dated and re-filed the same claim she filed on August 24, 2016. (Workers' Compensation Claim, September 2, 2016).
- 5) January 7, 2017, Charles Craven, M.D., orthopedic surgeon, examined Employee for an employer's medical evaluation (EME). (Craven report, January 7, 2017).
- 6) On January 25, 2017, Employer denied Employee's claims and her right to all benefits based on Dr. Craven's EME report. (Controversion Notice, January 24, 2017).
- 7) On February 9, 2017, the division rejected Employee's claim filed that date because she failed to sign it. (Workers' Compensation Claim, undated).
- 8) On February 13, 2017, Employee signed, dated and re-filed the claim she filed on February 9, 2017; she requested future medical costs, a penalty, interest and attorney fees and costs. (Workers' Compensation Claim, February 13, 2017).
- 9) On March 18, 2019, Employer, by mail service on Employee, denied her right to and claim for all benefits, based on a February 5, 2019 second independent medical evaluation (SIME) report from Jon Scarpino, M.D., orthopedic surgeon. (Controversion Notice, March 18, 2019).
- 10) On August 20, 2019, Employer requested a hearing on Employee's February 13, 2017 claim. (Affidavit of Readiness for Hearing, August 20, 2019).
- 11) On April 2, 2020, Employee filed a "Request for an extension." She sought more time for "all current deadlines" and cited 8 AAC 45.074, relating to hearing "continuances and cancellations." Employee needed more time to "reschedule a hearing" for at least 90 days because Dr. Scarpino and non-emergency medical care were "unavailable," and legal resources

were limited by Covid-19. Employee sought more time for all parties to prepare for hearing and for her to obtain legal counsel. She also contended she would be “harmed with inability to not appear via videoconference” at hearing. (Petition, April 2, 2020).

12) On April 20, 2020, Employer again requested a hearing on Employee’s February 13, 2017 claim. (Affidavit of Readiness for Hearing, April 20, 2020).

13) Employee has never requested a hearing on any claim. (Agency file).

14) On May 21, 2020, the parties met with a board designee and stipulated to a July 21, 2020 hearing. Employee was seeking counsel and anticipated having one shortly. Issues for the July 21, 2020 hearing were Employee’s February 13, 2017 claim and her April 2, 2020 petition. The summary stated Employer’s June 15, 2015 and January 25, 2017 controversions had both been “rescinded,” leaving only its March 18, 2019 controversion in effect. (Prehearing Conference Summary, May 21, 2020).

15) On June 23, 2020, Employee sought unspecified temporary total and partial disability benefits, permanent total disability benefits, permanent partial impairment benefits, attorney fees, costs, transportation expenses, a late payment penalty and interest. (Claim For Workers’ Compensation Benefits, June 23, 2020).

16) On July 16, 2020, Employee met with the board’s designee but Employer did not attend. She confirmed her April 2, 2020 petition applied to the July 21, 2020 hearing, “as she is not prepared to argue for the Merits of her claim.” She also clarified there was no documentation for her medical claim as it relates “to surgeries she has not had or been billed for yet.” Employee said she would not be filing a witness list because she cannot pay for or coordinate any witness testimony. The designee did not add issues from Employee’s June 23, 2020 claim to those set for the July 21, 2020 hearing because in his view it was too late to allow for proper preparation. (Prehearing Conference Summary, July 16, 2020).

17) At hearing on July 21, 2020, Employee testified she has tried to find an attorney to represent her in this case because she lacks confidence in preparing for and presenting arguments and evidence on her own. She tried calling most attorneys on the division’s attorney list and many told her they were too busy because they had claim resolution delayed by the Covid-19 pandemic. Though she said her medical condition was getting worse and she needed medical care and wanted the case to move forward, Employee contended she would be at a “huge disadvantage” if she was required to present her own case. Employer contended the April 2,

2020 petition applied to the prior hearing that was continued on different grounds, and is not “really applicable” to the July 21, 2020 hearing. It contended Employee had ample time to find a lawyer and prepare for hearing; furthermore, it contended there is no regulatory provision allowing for a hearing continuance because a party does not have an attorney. Employer agreed that the only controversion notice currently effective in this case is its March 18, 2019 controversion, the others having been rescinded. The designated chair calculated the time remaining for Employee to request a hearing, or ask for more time to request one, and advised her that date was March 22, 2021. (Record).

18) It is unusual for an employer that is not paying any benefits to an injured worker in a controverted case to press for a hearing on the injured worker’s claims. (Experience; judgment).

19) Two years from Employer’s March 18, 2019 controversion is March 18, 2021; three days added to March 18, 2021, is March 21, 2021, which is a Sunday. Monday, March 22, 2021, is the next day that is not a Saturday, Sunday or a holiday. (Observations).

20) Employer’s hearing brief raised a concern over Employee allegedly having made an unlawful change in her choice of attending physician. The designated chair explained the law to Employee and encouraged her to prepare a spreadsheet or otherwise be prepared to address this issue at her hearing on the merits. (Employers Supplemental Brief, July 16, 2020; record).

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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . Employers. . . .

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 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and

reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

8 AAC 45.060. Service. . . .

. . . .

(b) . . . Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. . . . Service by mail is complete when deposited in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail. . . .

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

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;

ANALYSIS

Was the oral order continuing the hearing correct?

Employee's February 13, 2017 and June 23, 2020 claims are presently pending; she has never requested a hearing on any claim. By contrast, Employer has filed two hearing requests on

Employee's controverted 2017 claim. It is unusual for an employer that is not paying any benefits to an injured worker in a controverted case to press for a hearing on the injured worker's claims. *Rogers & Babler*. Employee filed her April 2, 2020 petition seeking a hearing continuance in respect to the April 7, 2020 hearing, which was continued on other grounds not relevant to the instant inquiry. However, at the July 16, 2020 prehearing conference, Employee confirmed that the April 2, 2020 petition for a continuance again applies to the July 21, 2020 hearing and she said she was "not prepared to argue for the Merits of her claim."

Employer contended the April 2, 2020 petition is not applicable to the July 21, 2020 hearing because it applied only to the April 7, 2020 hearing. But this misstates Employee's position set forth at the July 16, 2020 prehearing conference; she again asserted her April 2, 2020 petition and requested a hearing continuance. Employer also contended Employee has had ample time to find a lawyer and prepare for hearing. But Employee credibly stated she has been trying to obtain counsel diligently and, due primarily to the Covid-19 pandemic, has had difficulty finding one because many attorneys she contacted said issues related to Covid-19 have delayed resolution of their cases and kept their caseloads too high to take on new work. AS 23.30.122; *Smith*. Employer controverted Employee's claim and is paying her no benefits. Consequently, this is not a case where Employer is losing money every time Employee's case fails to come to hearing. Any costs Employer is incurring currently relate to its efforts to force Employee's claim to a hearing against her will, because she is not prepared. AS 23.30.001(1).

Lastly, Employer contended the regulations provide no basis to continue a hearing simply because a party needs an attorney. But 8 AAC 45.074(b)(1)(N) gives this panel discretion to continue a hearing if, despite a party's due diligence, irreparable harm may result from a failure to continue the hearing. Employee has been diligent in trying to obtain counsel; irreparable harm may result if she presents her case before she is ready, without competent counsel to assist her -- she may lose with no basis for appeal. Therefore, the oral order granting her continuance request was correct.

At hearing, the designated chair advised Employee that she had procedural control over when her claims would be set for hearing; she could request a hearing on her claims at any time by filing

and serving an Affidavit of Readiness for Hearing. The chair further advised her that she had to take action to preserve her controverted February 13, 2017 claim: she must either file and serve a timely Affidavit of Readiness for Hearing, or a petition requesting more time to file one to avoid having her February 13, 2017 claim denied under AS 23.30.110(c). Specifically, Employer controverted Employee's February 13, 2017 claim effective March 18, 2019. Two years from March 18, 2019 is March 18, 2021. However, because Employer served its March 18, 2019 controversion on Employee by mail, three days must be added to the time in which she must act. 8 AAC 45.060(b). March 18, 2021, plus three days for mailing, is March 21, 2021, which is a Sunday. Because this date falls on a Sunday, the date by which Employee must act to preserve her February 13, 2017 claim moves to the next day, which is not a Saturday, Sunday or a legal holiday; that is March 22, 2021. 8 AAC 45.063(a). Employee must either file and serve an Affidavit of Readiness for Hearing or a petition requesting more time to file one by no later than March 22, 2021, or her February 13, 2017 claim may be denied under AS 23.30.110(c).

As Employer raised an issue about Employee's alleged unlawful change of her attending physician, the designated chair also advised her to develop a timeline addressing how she came to be seen by various medical providers, or otherwise be prepared to address that issue at a hearing on the merits of her claim, to save time at the next hearing.

CONCLUSION OF LAW

The oral order continuing the hearing was correct.

ORDER

Employee's April 2, 2020 petition to continue the July 21, 2020 hearing is granted.

Dated in Anchorage, Alaska on July 22, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/

Nancy Shaw, Member
PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 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 Interlocutory Decision and Order in the matter of Mindi Johnson, employee / claimant v. Alaska Court System, employer/insurer, defendants; Case No. 201415623; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on July 22, 2020.

/s/

Nenita Farmer, Office Assistant