ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

ERIC MCDONALD, Employee, Claimant, v. ROCK & DIRT ENVIRONMENTAL, INC., Employer, and INS. CO. OF THE STATE OF PENN., Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201410268 AWCB Decision No. 20-0092 Filed with AWCB Anchorage, Alaska on October 7, 2020

Eric McDonald's (Employee) September 8, 2020 petition to continue the October 21, 2020 hearing was heard on October 6, 2020, in Anchorage, Alaska, a date selected on September 25, 2020, on the division's own motion. Employee appeared, testified and represented himself with non-attorney Heather Johnson's assistance. Attorney Colby Smith appeared and represented Rock & Dirt Environmental, Inc., and its insurer (collectively, Employer). Attorney Eric Croft represents Employee's former lawyers from his civil action but he did not appear at hearing; the designated chair called Croft when the hearing began and left a message for him to call if he wanted to participate but he did not call. The record closed at the hearing's conclusion on October 6, 2020.

ISSUE

Employee contends this panel lacks jurisdiction to decide Employer's petition to dismiss because he has reopened his civil case and asked the superior court to vacate its order dismissing his third-party claims, which forms the basis for Employer's petition to dismiss. He contends the panel should wait until the superior court rules on his pending motion to set aside the court's existing order before deciding Employer's petition to dismiss. Alternately, Employee contends Employer has failed to provide its actual lien amount, and until it does, its petition to dismiss is premature.

Employer contends the panel has jurisdiction to decide its petition to dismiss. Though it contends it should not be paying any further benefits given the superior court's existing order, Employer continues to pay for some medical treatment and incur legal expenses. Therefore, Employer contends it will be prejudiced if the October 21, 2020 hearing on its petition to dismiss is delayed as these costs continue. It contends Employee has not shown good cause to continue the hearing.

Should the October 21, 2020 hearing be continued?

FINDINGS OF FACT

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

1) On June 13, 2014, Employee was injured while working for Employer. At some point thereafter Employee filed a civil lawsuit against third-parties to obtain pain and suffering and other damages for his various work-related injuries. (Employee).

2) On August 13, 2019, in *McDonald v. Architects Alaska, Inc. & BBFM Engineers, Inc.*, Superior Court Case No. 3AN-16-07620 Civil, the superior court ordered:

> On July 12, 2019 Defendant BBFM Engineers, Inc. (BBFM) moved to enforce the agreed-upon walk-away settlement with Plaintiff Eric McDonald (Plaintiff) and alternatively moved to extend the deadline for dispositive motion practice (footnote omitted). Defendant Architect Alaska, Inc. (AAI) later joined in BBFM's motion (footnote omitted).

> This court, having considered the evidence, communications, and affidavits submitted by Defendant Architects Alaska, Inc. and Defendant BBFM Engineers, Inc. and all materials, if any, submitted by Plaintiff Eric McDonald, finds the existence of a valid offer encompassing all essential terms, unequivocal acceptance by the offerees, consideration, and an intent to be bound. As such, this court is required to enforce the settlement agreement between all named parties and grants BBFM's motion to enforce a settlement agreement.
>
> IT IS HEREBY ORDERED that this action shall be dismissed with prejudice, each party to bear its own costs and attorney fees. (Order Granting Motion to Enforce Settlement Agreement, August 13, 2019).

3) On December 17, 2019, Employer sought an order dismissing Employee's claims, contending he compromised with the third-parties in his civil suit without obtaining Employer's written approval as required under AS 23.30.015. (Petition, December 17, 2019).

4) On July 14, 2020, the parties conferenced with a board designee to discuss Employer's petition to dismiss Employee's claim under §015(h). The conference summary reflects in part:

> Mr. McDonald expressed an interest in scheduling the hearing on Employer's petition to dismiss. The designee explored the parties' availability on October 21, 2020 for the hearing date. Mr. McDonald and Mr. Smith are both available. . . .

Accordingly, the designee set a hearing for October 21, 2020 on Employer's December 17, 2019 petition to dismiss Employee's claims. (Prehearing Conference Summary, July 14, 2020).

5) On September 8, 2020, Employee sought a board order continuing the October 21, 2020 hearing until the superior court could hear and decide his pending motion before the court seeking an order vacating the court's existing order dismissing his lawsuit. (Petition, September 8, 2020).

6) On September 15, 2020, Employer objected to the hearing continence and contended, among other things, a hearing on its petition to dismiss Employee's claim could negate the need to hear his multitudinous other claims and petitions. (Answer, September 15, 2020).

7) On September 23, 2020, Employee, in his civil action, sought an injunction to stay the board's October 21, 2020 hearing in his workers' compensation case. (CourtView, 3AN-16-07620 Civil, *McDonald v. Architects Alaska, Inc., et al*).

8) On October 5, 2020, the court in Employee's civil action issued in brief summary the following:

> . . . Whether a settlement agreement existed between the parties requires further consideration.
>
> IV. **ORDER**
>
> Accordingly, and for these reasons, the Court orders as follows:
>
> (1) Mr. McDonald's *Motion for Over Length Pleading* is **GRANTED**;
> (2) BBFM's *Cross-Motion to Establish Briefing Schedule and Page Limits on the Motion to Vacate* is **GRANTED**;
>
> a. The defendants have until October 15, 2020 to file their oppositions, which must be no longer than fifty pages; and
> b. Mr. McDonald has until October 20, 2020 to file his reply, which must be no longer than twenty pages.
>
> (3) BBFM's request to stay *Briefing on Plaintiff's Motion to Join Additional Parties until the Motion to Vacate Is Decided* is **GRANTED**;
>
> (4) Mr. McDonald's motion to join employer R&D Environmental, AIG, Northern Adjusters, Colby Smith and Griffin and Smith to Third Party Case is **STAYED**;
>
> (5) Mr. McDonald's Motion for Change of Venue to Kenai is **STAYED**;
>
> (6) Mr. McDonald's Request for Expedited Consideration is **GRANTED**.
>
> IT IS SO ORDERED

Employee relies on the court's order, which he contends shows a genuine question of material facts exists as to whether he compromised with a third-party, which would allow Employer to dismiss his workers' compensation case. He therefore contends this order is further evidence that the October 21, 2020 hearing should be "tolled" until the superior court and if necessary the Alaska Supreme Court renders their final decisions on his request to set aside the superior court's August 13, 2019 order dismissing his third-party case with prejudice. (Notice of Intent to Rely; Order Regarding Multiple Motions and Establishing a Briefing Schedule and Page Limits regarding Plaintiff's Motion to Vacate; October 5, 2020; emphasis in original).

9) The court did not rule on Employee's September 23, 2020 motion for an injunction and order staying the board's October 21, 2020 hearing in his workers' compensation case. (Observation).

10) At hearing on October 6, 2020, Employee contended that under §074(b)(1)(L) the hearing should be continued until the superior court determines if the third-party "settlement" order was

valid; he adamantly contended it was not. He contended continuing the October 21, 2020 hearing will "not involve" Employer who will suffer no harm. Employee pointed to missing discovery in his superior court case, which in his view constitutes "additional evidence or arguments" that bear on the dismissal issue set for hearing before the board on October 21, 2020. Under §074(b)(1)(M), Employee challenges the board's jurisdiction to hear and decide Employer's petition to dismiss in light of the superior court exercising its jurisdiction and reopening his civil action. He contends this is a "multijurisdictional" question and if the board rules on Employer's petition to dismiss his workers' compensation claim, this ruling may conflict with what he presumes will be the superior court's vacation of its existing order dismissing his third-party case, which formed the basis for Employer's petition in the first instance. He contended the board should continue the October 21, 2020 hearing because it knows the court is reviewing its dismissal order, is expediting the process and the court reversing its existing order is a "real possibility." Employee contended he would suffer "irreparable harm" if the hearing is not continued because he might be unsuccessful in getting the superior court's existing order overturned. He concedes no one knows how a legal proceeding may turn out and he is not willing to gamble that he could successfully overturn a board or commission decision dismissing his compensation claims, in the event the superior court subsequently reversed its prior decision dismissing his civil action. Employee further contended Employer has yet to provide evidence of its actual lien and until it does, a hearing on Employer's petition to dismiss involving said lien is premature. Lastly, he contends the superior court's dismissal order did not take into account any apportionment of fault as required by law. He testified Employer was 100 percent at fault for his accident, meaning there would be no basis for Employer's lien once fault was allocated properly. (Employee).

11) Employee testified Employer has a statutory lien worth at least $400,000; he also testified he received no money from the third-parties in the civil action as a result of the alleged "settlement," which the superior court enforced as the basis to dismiss his civil action. (Employee).

12) Employer contended there is no "good cause" basis for continuing the October 21, 2020 hearing. It contended it will be harmed if the hearing is canceled or continued because it has agreed to pay, and continues to pay, medical benefits for Employee's bilateral shoulder and his knee. As Employee stated he would appeal any adverse superior court decision to the Alaska

Supreme Court, Employer contended its liability to continue paying pre-authorized medical care could continue for years as Employee's civil action proceeds through the court system. By contrast, it contended should the board dismiss Employee's claim following the October 21, 2020 hearing, he has a remedy in the event the superior court subsequently vacates its existing order dismissing his claims and reinstates them; Employee could petition the board for reconsideration or modification, and in that event, Employer stated it would not oppose Employee's request because the basis for its recent controversion would have gone away. Lastly, Employer contended Employee is a prolific litigator who has filed hundreds of claims and petitions, including new ones on the hearing date, which requires Employer to pay its attorney to respond thus increasing and continuing litigation costs for so long as Employee litigates his superior court case. (Record).

13) Statutes and regulations regulating setting and continuing or canceling board hearings are intended to prevent parties from scheduling hearings without being ready, and then canceling them without good cause thus depriving a spot on the hearing docket for an injured worker or employer who is ready for a hearing. (Experience; judgment).

14) No board decision in this case is presently pending before the commission, the superior court or the Alaska Supreme Court. (Observations).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. 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;
> . . . .
>
> (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, 531 (Alaska 1987). In *Alaska Public Interest*

Research Group v. State, 167 P.3d 27 (Alaska 2007) (*AKPIRG*), the court stated, "The legislature may constitutionally delegate some adjudicative power to an executive agency, but it may not delegate judicial power." *Id*. at 35-36. *AKPIRG* said, referring to the Alaska Workers' Compensation Appeals Commission:

> The scope of its jurisdiction is not that different from the Board's jurisdiction, except that the Appeals Commission performs a quasi-judicial function that is akin to appellate review, while the Board performs a quasi-judicial function that resembles that of a trial court. We recognize that the Appeals Commission, like the Board, may be required to apply equitable or common law principles in a specific case, but both of these quasi-judicial agencies can only adjudicate in the context of a workers' compensation case. Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim. (*Id*. at 36-37; footnotes omitted). . . .

AS 23.30.005. Alaska Workers' Compensation Board. . . .
. . . .

(h) . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

AS 23.30.015. Compensation where third persons are liable. . . .
. . . .

(f) Even if an employee, the employee's representative, or the employer brings an action or settles a claim against the third person, the employer shall pay the benefits and compensation required by this chapter.

(g) If the employee or the employee's representative recovers damages from the third person, the employee or representative shall promptly pay to the employer the total amounts paid by the employer under (e)(1)(A)-(C) of this section insofar as the recovery is sufficient after deducting all litigation costs and expenses. Any excess recovery by the employee or representative shall be credited against any amount payable by the employer thereafter. If the employer is allocated a percentage of fault under AS 09.17.080, the amount due the employer under this subsection shall be reduced by an amount equal to the employer's equitable share of damages assessed under AS 09.17.080(c).

(h) If compromise with a third person is made by the person entitled to compensation or the representative of that person of an amount less than the compensation to which the person or representative would be entitled, the employer is liable for compensation stated in (f) of this section only if the compromise is made with the employer's written approval.

> (i) If the employer is insured and the carrier has assumed the payment of compensation, the carrier shall be subrogated to all the rights of the employer. . . .
>
> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
>
> (c) . . . After a hearing has been scheduled, the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing, except for good cause as determined by the board. . . .
>
> **AS 23.30.125. Administrative review of compensation order.** (a) A compensation order becomes effective when filed with the office of the board as provided in AS 23.30.110, and, unless proceedings to reconsider, suspend, or set aside the order are instituted as provided in this chapter, the order becomes final on the 31st day after it is filed.
>
> (b) Notwithstanding other provisions of law, a decision or order of the board is subject to review by the commission as provided in this chapter. . . .
>
> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, . . . a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits . . . or before one year after the rejection of a claim, 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. . . .

The board may modify a prior decision on its own initiative or upon application by an interested party so long as "the board's review process begins" within one year of the last payment of compensation or the rejection of the claim. *Griffiths v. Andy's Body & Frame, Inc*. 165 P.3d 619 (Alaska 2007). In other words, the modification process begins when a party files a petition; the board's decision on the petition need not occur until after the one year period expires.

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case. . . . 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. . . .
>
> **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

(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;
(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; . . . .

In *Metcalf v. Felec Services*, 784 P.2d 1386, 1389 (Alaska 1990), an employer contended a statutory interpretation would open the door for employees to purposefully drag out hearings by obtaining unnecessary continuances thus enlarging the time during which benefits were still being paid. *Metcalf* stated:

> This contention is answered by the time limits imposed on Board action by the Alaska Administrative Code. . . . Continuances, postponements, cancellations, or changes of scheduled hearings are not favored by the Board and will not be routinely granted. 8 AAC 45.074(a). They are granted only for carefully delimited 'good cause' (footnote omitted). *Id.* If the Board finds that a request for a delay by an employee is not for good cause, it can and should deny it. *Id.*

"Irreparable harm" is harm for which there is no plain, adequate, and complete remedy at law and for which money damages would be impossible, difficult or incomplete. *Dunning v. Varnau*, 95 N.E.3d 587 (Ohio App. 2017).

ANALYSIS

Should the October 21, 2020 hearing be continued?

Employee contends the October 21, 2020 hearing on Employer's petition to dismiss his claims under §015(h) should be continued until the superior court has ruled on his pending request for the court to set aside its August 13, 2019 order dismissing his third-party case with prejudice. Employer contends he has not provided good cause to continue the October 21, 2020 hearing.

No decision issued previously in this case is under review by any court. *Rogers & Babler*. Consequently, nothing divests jurisdiction from this administrative panel. Employee presented no statute, regulation or decisional law supporting a notion that this panel cannot move forward adjudicating issues in his case, including the December 17, 2019 petition to dismiss his claims.

On July 14, 2020, Employee expressed an interest in going to hearing on Employer's petition to dismiss. Accordingly, the designee set a hearing for October 21, 2020. Once a hearing has been scheduled, "the parties may not stipulate to change the hearing date or to cancel, postpone, or continue the hearing" except for good cause. AS 23.30.110(c). This is intended to prevent parties from scheduling hearings without being ready, and then canceling them without good cause thus depriving a spot on the hearing docket for an injured worker or employer who is truly ready for hearing. *Rogers & Babler*. Hearing continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Administrative regulations determine and "delimit" what constitutes "good cause" to continue or cancel a hearing. 8 AAC 45.074(b)(1)(A)-(N); *Metcalf*. Employee relies primarily on §074(b)(1)(L) and (N) to support his continuance request.

(1) There is no current basis to continue the hearing under §074(b)(1)(L).

Under §074(b)(1)(L), Employee contends only the superior court can decide whether to vacate the court's August 13, 2019 dismissal order; he is correct on this point. *AKPIRG*. He is also asking this panel to find in advance that "at a scheduled hearing" on October 21, 2020 due to surprise, excusable neglect, or inquiry at that hearing, "additional evidence or arguments" will be necessary to complete the hearing under §074(b)(1)(L). This section normally applies when, at a hearing, the panel or the parties realize unexpectedly that some vital evidence is missing; in such circumstances a hearing may be continued or the record left open to receive the missing evidence. Here, by contrast, Employee contends his discovery in the third-party case is not yet complete, and facts he will establish therein constitute "additional evidence or arguments" applicable to Employer's petition to dismiss his workers' compensation claim. Employee primarily contends this decision should wait to rule on the petition to dismiss his claims until the superior court rules on his pending motion for the court to vacate an existing superior court order. But he fails to explain how incomplete discovery or "additional evidence or arguments" in his third-party civil case have any bearing on hearing Employer's petition to dismiss his workers' compensation claim.

Unless and until the superior court vacates its existing order dismissing Employee's third-party lawsuit, relevant "evidence or arguments" for the October 21, 2020 hearing include: (1) Does Employer have a workers' compensation lien under §015(g), (i), and if so how much is it? This fact was proven by Employee's testimony at hearing; (2) Did Employee or his agents

compromise with third-parties in a civil action for an amount less than the workers' compensation lien under §015(h)? These facts were determined in the superior court's existing order, which enforced the settlement agreement, and through Employee's testimony stating he got no money from the compromise; and (3) Did Employer provide written approval for the compromise under §015(h)? This fact will need to be found at the October 21, 2020 hearing. While Employee may have evidence to present before the superior court on his motion to vacate the court's existing order dismissing his third-party claims that evidence is not relevant in addressing Employer's petition to dismiss his workers' compensation claims based on the court's order. As he correctly noted, this panel has no jurisdiction over the superior court's orders. *AKPIRG*. Thus, Employee has not provided "good cause" under §074(b)(1)(L) to continue his October 21, 2020 hearing.

(2) There is no current basis to continue the hearing under §074(b)(1)(N).

Under §074(b)(1)(N), Employee contends "irreparable harm" may result if this panel decides Employer's petition to dismiss his claims before the superior court rules on his motion to vacate its August 13, 2019 dismissal order. He contends a "premature" decision from this panel could take years to correct, and result in complicated, unnecessary, wasteful and unfair legal processes for him. He is confident the superior court will vacate its existing order thus invalidating any decision this panel could make dismissing his workers' compensation claims.

The regulations specify and "delimit" what constitutes "good cause" to continue a scheduled hearing. 8 AAC 45.074(b)(1); *Metcalf*. However, neither the Act nor applicable administrative regulations define "irreparable harm." The panel could find no Alaska case law defining this term in respect to hearing continuances or cancellations. At least one court has decided in the continuance context that "irreparable harm" is harm for which there is no plain, adequate, and complete remedy at law and for which money damages would be impossible, difficult or incomplete. *Dunning*. Using the *Dunning* definition, Employee clearly has remedies should the October 21, 2020 hearing result in a decision dismissing his claims under §015(h): First, he could appeal that decision to the commission under §125, await the superior court's order, and if it is favorable to him seek relief from the commission; second, if the superior court reverses itself within 15 days of an unfavorable decision from the October 21, 2020 hearing, he can seek

reconsideration under §540; lastly, at any time within one year following an unfavorable decision from the October 21, 2020 hearing, he can ask for modification under §130. Even if Employee pursues an appeal to the Alaska Supreme Court from an adverse superior court decision, if he files a timely request for modification of a decision dismissing his workers' compensation claims he can later pursue his modification petition even if his appeal takes years but he ultimately succeeds before the Alaska Supreme Court. *Griffiths*. These remedies are plain, adequate, complete, will provide money damages if he prevails and are not impossible, difficult or incomplete. *Dunning*. Employee and Johnson have proven their ability to file appropriate and successful pleadings in various forums.

Meanwhile, unless and until the superior court overturns its existing order dismissing Employee's lawsuit, if Employer prevails on his petition to dismiss his workers' compensation claims it will not have to pay benefits extinguished under §015(f), (h) and need not continually incur attorney fees and costs defending against Employee's claims and petitions. Notably, Employer stated it would not oppose a petition for reconsideration or modification in the event Employee's workers' compensation claims were dismissed under §015(f), (h) following the October 21, 2020 hearing and the superior court subsequently vacated its existing order dismissing his third-party suit.

In short, Employee retains several effective remedies should the October 21, 2020 hearing decision dismiss his claims and the superior court subsequently vacates its order dismissing his third-party suit. Because he has not shown "irreparable harm may result from a failure to grant his requested continuance, Employee has not demonstrated "good cause" to continue or cancel the October 21, 2020 hearing under §074(b)(1)(N).

Lastly, Employee raised *res judicata* and cited decisions sanctioning injured workers' failures to cooperate in discovery as support for a lesser sanction than dismissal. However, the matter set for hearing October 21, 2020 is not a discovery dispute; lesser sanctions are not available under §015(h). Employer's petition is based on a superior court order in a separate legal action. While his *res judicata* arguments are unclear, Employee can raise them at the October 21, 2020 hearing.

For all the reasons set forth above, Employee has not met his burden to show "good cause" to continue the October 21, 2020 hearing. Furthermore, the legislature requires that process and procedure under the Act "shall be as summary and simple as possible." AS 23.30.005(h). There is no stay from the superior court ordering this panel to withhold its jurisdiction and duty under the Act to hear and decide the issues presented before it, even though Employee asked for one. Employer has the same rights Employee has to a quick, efficient and fair proceeding and at a reasonable cost to Employer. Both parties have a right to due process, an opportunity to be heard and for their arguments and evidence to be fairly considered. AS 23.30.001(1), (4). These fundamental principles support the decision not to continue the October 21, 2020 hearing.

Employee correctly notes this panel and its decisions lack any jurisdiction over the superior court's existing order; this panel can neither affirm nor reject the court's order. *AKPIRG*. The existing August 13, 2019 order is simply evidence upon which Employer relies in its request to dismiss Employee's workers' compensation claims under §015(f), (h). For all these reasons, Employee's petition to continue the October 21, 2020 hearing will be denied.

The question before the panel today does not involve whether or not third-parties or their attorneys in a dismissed third-party case should be allowed to testify at the October 21, 2020 hearing. Such arguments can and should be raised and resolved at a prehearing conference prior to the October 21, 2020 hearing. However, the result of those arguments, whatever it might be, also does not provide a current legal basis to continue the October 21, 2020 hearing.

CONCLUSION OF LAW

The October 21, 2020 hearing will not be continued.

ORDER

Employee's petition to continue the October 21, 2020 hearing is denied.

Dated in Anchorage, Alaska on October 7, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/

William Soule, Designated Chair

/s/
Sara Faulkner, Member

NANCY SHAW, MEMBER, DISSENTING

The dissent respectfully disagrees with the majority's decision and would continue the October 21, 2020 hearing. First, holding a lengthy hearing given the possibility that the superior court may vacate its existing order dismissing Employee's third-party case is a waste of time and resources for the agency and the parties. Second, since the court has granted expedited consideration of Employee's request to vacate the existing court order, Employer will not be harmed by a significant delay; the court intends to resolve the matter promptly. Third, the majority assumes Employee will appeal to the Alaska Supreme Court from an unfavorable superior court decision on his pending motion, thus exposing Employer to continuing liability for benefits under the Act; but this is mere speculation. Fourth, dismissing Employee's claim is a drastic, final remedy; consequently, it makes sense to allow the superior court to examine and rule on his pending motion before applying the death knell to his claim. Lastly, while the outcome of any litigation is never a certainty, continuing the October 21, 2020 hearing until the court rules on Employee's pending motion would insert at least a degree of certainty into this case with little to no prejudice to Employer. For these reasons, the dissent would continue the October 21, 2020 hearing.

/s/
Nancy Shaw, Member

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 Eric Mcdonald, employee / claimant v. Rock & Dirt Environmental, Inc., employer; Insurance Company of the State of Pennsylvania, insurer / defendants; Case No. 201410268; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on October 7, 2020.

/s/
Kimberly Weaver, Office Assistant