

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CARMELITA E. ZYGMUNT,)	
)	
Employee,)	
)	
v.)	FINAL DECISION AND ORDER
)	
THE ARC OF ANCHORAGE,)	AWCB Case No. 201908902
)	
Employer,)	AWCB Decision No. 21-0050
and)	
)	Filed with AWCB Anchorage, Alaska
BERKSHIRE HATHAWAY HOMESTATE)	on June 11, 2021
INSURANCE CO.,)	
)	
Insurer,)	
)	
Defendants.)	
)	

Employer The Arc of Anchorage's petition for an order awarding compensation benefits to Carmelita Zygmunt (Employee) was heard on the written record on June 10, 2021, in Anchorage, Alaska, a date selected on June 9, 2021. Employer's June 9, 2021 request gave rise to this hearing. Employee represents herself but did not participate. Attorneys John Perriman and Michelle Meshke represent Employer and its insurer. The record closed on June 10, 2021.

ISSUE

Employer does not dispute Employee was injured while working for it but contends a third-party may be liable for her injury. Employer seeks an order awarding Employee compensation it previously paid voluntarily, pursuant to AS 23.30.015(b).

Employee did not answer Employer's petition, has not filed a claim and did not participate in the prehearing conference giving rise to this hearing. Her position on Employer's petition and lack of hearing notice is unknown.

Should Employer's request for a compensation award to Employee be heard without notice to her, and granted?

FINDINGS OF FACT

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

- 1) On June 18, 2019, while working for Employer, Employee was injured in a motor vehicle accident in which her vehicle was struck by another vehicle driven by Raymond Muetz. (Memorandum in Support of Expedited Nunc Pro Tunc Order Pursuant to AS 23.30.015(b), May 13, 2021).
- 2) Employer paid Employee's medical bills for this accident, including chiropractic care, totaling \$10,953.80, until it subsequently controverted (*i.e.*, denied) these benefits. (*Id.*, Exhibit A).
- 3) On May 13, 2021, Employer asked the Workers' Compensation Board to issue a compensation order *nunc pro tunc* (*i.e.*, effective retroactively) from the accident date, finding Employee was entitled to the compensation benefits she has already received. Employer requests an assignment order pursuant to the Alaska Workers' Compensation Act (Act) so it can pursue subrogation (*i.e.*, reimbursement) against Muetz in the event Employee does not file an action against him. Nothing in Employer's petition is intended to waive any rights Employee may have under the Act. (*Id.*).
- 4) Employee has not filed a claim or answered Employer's May 13, 2021 petition and did not appear at the June 9, 2021 prehearing conference where Employer made its request for a hearing on its petition. The designee at the prehearing conference was unable to reach her by telephone. Thus, Employee's position on Employer's petition and its request for a prompt hearing on the petition is unknown. Though Employer did waive its right, Employee did not expressly waive her right to object to a hearing without 10-days' prior notice. (Prehearing Conference Summary, June 9, 2021).
- 5) As of May 13, 2021, Employee had not filed a civil action against Muetz, and no evidence in the agency file suggests she plans on doing so. The statute of limitations for either Employee or Employer to file a Superior Court personal injury action against Muetz is June 18, 2021. (Memorandum in Support of Expedited Nunc Pro Tunc Order Pursuant to AS 23.30.015(b), May 13, 2021).

6) Time is of the essence in this instance. (*Id.*).

PRINCIPLES OF LAW

AS 23.30.015. Compensation where third persons are liable. (a) If on account of disability or death for which compensation is payable under this chapter the person entitled to the compensation believes that a third person other than the employer or a fellow employee is liable for damages, the person need not elect whether to receive compensation or to recover damages from the third person.

(b) Acceptance of compensation under an award in a compensation order filed by the board operates as an assignment to the employer of all rights of the person entitled to compensation and the personal representative of a deceased employee to recover damages from the third person unless the person or representative entitled to compensation commences an action against the third person within one year after an award.

....

(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.

....

(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.

Employee's acceptance of compensation under an "award" acts as an assignment to Employer of her right to pursue a third-party unless Employee files an action against the third-party within one year of the award. An "award" of benefits Employer previously paid voluntarily may be issued allowing Employer to obtain an assignment for AS 23.30.015 purposes. *Collier v. Fluor Daniel Alaska, Inc.*, AWCB Decision No. 91-0010 (January 16, 1991).

ANALYSIS

Should Employer's request for a compensation award to Employee be heard without notice to her, and granted?

According to the agency file, Employer has not disputed that Employee's June 18, 2019 accident and associated injury arose out of and in the course of her employment with Employer. Employer

voluntarily paid her compensation benefits in the form of medical care related to her work accident. There is no evidence Employee has filed or plans to file a civil action in the Superior Court against Muetz, the driver who injured her. Employer wants to recover from Muetz \$10,953.80 in benefits it paid on Employee's behalf.

Under Alaska law, Employer needs an order "awarding" compensation benefits already paid to Employee so it can exercise its right under the Act to file its own action against Muetz and recover these benefits. However, the order Employer requests must be issued before the statute of limitations runs out on June 18, 2021, or Employer's right to obtain reimbursement from Muetz may be lost. Employee did not appear at the prehearing conference and could not be reached. There was insufficient time to provide her with 10-days' notice of this written record hearing because the statute of limitations will run out before she can be given proper notice. Consequently, and based on the undisputed factual findings and conclusions above, Employer's request for an order awarding compensation to Employee without notice to her will be granted *nunc pro tunc*. AS 23.30.015(a), (b), (f), (h); *Collier*.

This order does not affect Employee's rights under the Act. It only affects Employer's right to get its money back from Muetz. Nevertheless, since Employee did not expressly waive her right to object to a hearing being set on the written record without the required 10-days' notice, she retains her right to do so as well as her right to appeal, or request reconsideration or modification of this decision and order in accordance with the instructions set forth below, if she disagrees with it.

CONCLUSION OF LAW

Employer's request for a compensation award to Employee will be heard without notice to her and will be granted.

ORDER

1) Employer's May 13, 2021 petition for an order awarding Employee compensation under AS 23.30.015 and its request for a hearing on its petition without notice to Employee are granted.

2) Employee was entitled to and is awarded \$10,953.80 in past workers' compensation benefits for her June 19, 2019 work-related injury with Employer *nunc pro tunc* effective June 19, 2019.

3) Employer is entitled to a credit for \$10,953.80 already paid.

Dated in Anchorage, Alaska on June 11, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/

William Soule, Commissioner's Designee under
8 AAC 45.071(a), (b)(1)(A)

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 Carmelita E. Zygmunt, employee v. The Arc of Anchorage, employer, and Berkshire Hathaway Homestate Insurance Co. insurer / defendants; Case No. 201908902; 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 June 11, 2021.

