

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

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|---------------------------------|---|-----------------------------------|
| IN THE MATTER OF THE PETITION |) | INTERLOCUTORY |
| FOR A FINDING OF THE FAILURE TO |) | DECISION AND ORDER |
| INSURE WORKERS' COMPENSATION |) | |
| LIABILITY, AND ASSESSMENT |) | AWCB Case No. 700006914 |
| OF A CIVIL PENALTY AGAINST, |) | |
| |) | AWCB Decision No. 21-0060 |
| TRIPLE J ROADHOUSE LLC, |) | |
| |) | Filed with AWCB Anchorage, Alaska |
| Respondent(s). |) | on July 16, 2021 |
| |) | |

Triple J Roadhouse, LLC's, (Employer) June 16, 2021 request for a hearing continuance and an oral hearing on the Division of Workers' Compensation, Special Investigations Unit (SIU) Petitions for Failure to Insure Workers' Compensation Liability, and Assessment of a Civil Penalty was heard in Anchorage, Alaska on the written record on June 18, 2021, a date selected on May 11, 2021. An April 14, 2021 hearing request gave rise to this hearing. Investigator Brian Surprise represented the SIU. Jessica Briles represented Employer. *In re Triple J Roadhouse, LLC*, AWCB Decision No. 21-0055 (June 29, 2021) reopened the record for 10 days to provide the SIU the opportunity to answer Employer's June 16, 2021 request. The record closed on July 12, 2021, after the panel reviewed the SIU's answer and deliberated.

ISSUE

Employer's registered agent and member, Jessica Briles, contended she did not have enough time to prepare for a hearing. She objected to the written record hearing and requested a continuance and an oral hearing on the SIU's petitions for failure to insure workers' compensation liability and assessment of a civil penalty.

The SIU did not oppose Employer's request for a hearing continuance and an oral hearing on the SIU's petitions.

Should the written record hearing be continued and an oral hearing scheduled?

FINDINGS OF FACT

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

- 1) On April 27, 2018, Jessica and James Briles began Employer as a limited liability company with Ms. Briles as the registered agent and each as 50 percent owners. (Notice of Evidence Introduced for the Hearing on the Written Record, May 27, 2021, Exhibit 1)
- 2) On July 17, 2019, the SIU sought a civil penalty against Employer, and served the petition and discovery demand at Employer's address of record. (Petition, Discovery Demand, July 17, 2019).
- 3) On August 6, 2020, the SIU amended its petition seeking a civil penalty against Employer and served it to Employer's address of record. (Amended Petition, Discovery Demand, August 6, 2020).
- 4) On May 11, 2021, the board designee attempted to call "the number on file" for Employer and "left a detailed message." The designee scheduled a written record hearing for June 16, 2021, and set the deadline for evidence as May 27, 2021, and directed Employer to file and serve medical evidence with a medical summary form. The prehearing conference summary did not explain how to file nonmedical evidence. (Prehearing Conference Summary, May 11, 2021).
- 5) Employer's party has cell and home phone numbers on record. It is unclear which number the board designee called at the May 11, 2021 prehearing conference. (ICERS, Party Entry; Observation).
- 6) On May 24, 2021, Investigator Brian Surprise was added as a party. (ICERS, Party, May 24, 2021).
- 7) On May 27, 2021, Investigator Weyrick filed 175 pages of evidence for hearing. (Notice of Evidence Introduced for the Hearing on the Written Record, May 27, 2021).
- 8) On May 28, 2021, Ms. Briles called and spoke with a workers' compensation officer:

ER was upset that the hearing on the written was set without her. ER stated that the phone number they called is an old number and was surprised that they didn't use the same number they used last time. I informed ER that the prehearing officer used whats [sic] in the case file. the [sic] ER was adamant that Nick w/ SIU knows her

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contact info and also the prehearing officer called her before on that number from prior prehearings. ER was not in agreement that she was not given adequate time to prepare for the upcoming hearing and she wanted an oral hearing and not hearing on the written record. ER added that [sic] now she doesn't have enough time to review SIU's evidence that she just received today. Advised ER to send an email to the investigator and the webmail that she is requesting an urgent prehearing and that she objects to the ph summary and setting the hearing on the written record and we will do what we can to put them on the calendar. (ICERS, Phone Call Entry, May 28, 2021).

9) On June 16, 2021, Ms. Briles forwarded an email to the Board, including an email she sent to Investigator Weyrick which was returned to her as undeliverable. In the email to Investigator Weyrick, Ms. Briles stated:

I am writing this email today because it is the first moment I have had to write a reply to at least one of many discrepancies in Mr. Weyrick's claims regarding my business. Unfortunately for us we are a small business and it is not in my capacity to spend all my time responding and researching all the documents and exhibits as of 2 weeks ago I finally received. I noticed Mr Weyrick did not include in his exhibits the timeline I sent him. Nor did he detail why I was in the hospital. He did not tell you I almost lost my life twice to Stage 3b Colon Cancer. He did not show you how for the last summary hearing they called a number that had not been in use for the business or myself since July of 2018. He did not show that on several notices sent to me the correct numbers for Triple J Roadhouse and my cell were listed on there. So why in the last summary hearing would a number not in use be called? It was never called before. I have phone records to prove this.

I have to get busy trying to keep my small business going. I will be appealing the Boards decision if it goes against Triple J Roadhouse based on Mr. Weyrick documents only. I have began [sic] going through the over 100 pages I received on May 29, 2021. I have found several inaccuracies. I am including proof of one.

Mr. Weyrick states that Denise Pharr worked for Triple J Roadhouse from February 22, 2021 through March 13, 2021.

He is basing this off paycheck stub. However Ms Pharr's last day of employment was March 8th[.] I tried to explain to Mr. Weyrick several times why using pay stubs to calculate penalty or to determine when an employee worked or how many were working was an inaccurate way to determine this. He would [sic] never listen. This is part of the reason I did not respond to Mr Weyrick. Especially when he told me that I needed to pay a "significant amount down immediately to be able to work with a reduced amount or to start a payment plan[.]" My business was closed 5 months during the year 2020. I finished Chemo in February. We lost the building we were in due to Covid in August. We relocated. We lost our home. I had to have another surgery in the fall of 2020 due to complications from the first surgery the prior year

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and yes more precancerous cells were also found and removed. All of this Mr Weyrick is aware of and yet he states that he did not receive anything to show him the business was having any financial hardships. With a global pandemic and his knowledge of the above I thought it was very obvious. Restaurants were hit the hardest with the pandemic alone. Our sales were down over 65% in 2020 from the prior year.

Attached is Denise Pharr actual clock in and clock out hours. She worked a total of 34 hours for Triple J Roadhouse.

In closing I will also add that Mr Weyrick assured me several times when I asked what does all of this mean?

Where is all of this leading to? What do I need to do so we can just be done with all of this? He always told me you may receive a small penalty fee but most times not even that. I am sorry but almost 20,000 is not a small amount. We are barely hanging on in a small cafe size building.

I nor my husband have ever tried to intentionally not uphold the law of maintaining Workmans [sic] Compensation. There has never been a claim or injury in 3 years at Triple J Roadhouse. The three lapses have been in the beginning when we were unaware which I fixed immediately, 2nd time a miscommunication between myself and insurance company. I also fixed quickly and went with a new company. The 3rd when I was incapacitated while fighting for my life.

Mr Weyrick's lack of compassion stands out in one of the emails when I was in the hospital and he asked if someone else could attend the hearing. Well no all my family was with me wondering if their wife/ mother would even live. (Emails, June 16, 2021).

10) On June 29, 2021, *Triple J Roadhouse I* issued and reopened the record to provide the SIU the opportunity to answer Employer's June 16, 2021 request for a continuance and an oral hearing. (*Triple J Roadhouse I*).

11) On July 2, 2021, the Investigator Surprise filed an answer to Employer's June 16, 2021 request. The SIU did not oppose a continuance or an oral hearing. (Answer to Employer/Respondent's Request for Continuance and Oral Hearing, July 2, 2021.)

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

....

(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.

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 45.070. Hearings (a) . . . A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

....

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

Should the written record hearing be continued and an oral hearing scheduled?

Under 8 AAC 45.070(a), "A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter...." 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. Workers' compensation proceedings must be fair and the parties afforded due process. AS 23.30.001(4). Employer was not properly informed how to file non-medical evidence in the May 11, 2021 prehearing conference summary and was not informed how to file and serve a petition seeking a continuance on May 28, 2021, when Ms. Briles called and objected to the written record hearing.

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Investigator Weyrick is no longer employed with the division so Ms. Briles attempt to contact him about a hearing continuance as directed by the workers' compensation officer were futile. Ms. Briles contended she did not have enough time to prepare for the written record hearing and she needed additional time to provide evidence on Employer's ability to pay a civil penalty in light of her medical issues and the effect of Covid-19 on Employer's finances. The SIU did not object to a continuance or an oral hearing. To ensure the proceedings are fair and that Employer is afforded due process, the request to continue the written record hearing and to schedule an oral hearing will be granted. AS 23.30.135(a).

CONCLUSION OF LAW

The written record hearing will be continued and an oral hearing scheduled.

ORDER

- 1) Employer's June 16, 2021 request for a hearing continuance and an oral hearing is granted.
- 2) A prehearing conference will be scheduled to arrange a new oral hearing date and deadlines for hearing evidence and briefs and to inform Employer how to file evidence.

Dated in Anchorage, Alaska on July 16, 2021.

ALASKA WORKERS' COMPENSATION BOARD

 /s/
Kathryn Setzer, Designated Chair

 /s/
Robert Weel, Member

 /s/
Bronson Frye, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or 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

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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 Final Decision and Order in the matter of In re TRIPLE J ROADHOUSE LLC; Employer / respondent(s); Case No. 700006914; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served upon the parties by certified U.S. Mail, postage prepaid, on July 16, 2021.

/s/

Kimberly Weaver, Office Assistant II