

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSE R. INIGUEZ QUINONEZ,)
)
Employee,)
Claimant,)
v.) INTERLOCUTORY
) DECISION AND ORDER
)
TRIDENT SEAFOODS,) AWCB Case No. 201614882M; 201603968
)
Employer,) AWCB Decision No. 21-0110
and)
LIBERTY INSURANCE CORPORATION,) Filed with AWCB Anchorage, Alaska
) on November 23, 2021
)
Insurer,)
Defendants.)
)

Employee Jose R. Iniguez Quinonez's September 21, 2017, October 9, 2017, January 4, 2018, January 29, 2019, April 23, 2019, June 25, 2019, October 2, 2019, March 31, 2020, and December 21, 2020 claims for various benefits and his April 25, 2018 petition to review the Rehabilitation Benefits Administrator's (RBA) determination were scheduled to be heard on November 9, 2021, in Anchorage, Alaska, a date selected on September 21, 2021. A March 21, 2020 hearing request gave rise to this hearing. Employee briefly attended the hearing by telephone and asked for a continuance and a Spanish interpreter, but did not testify because he disconnected from the call before the interpreter was available. Attorney Jeffrey Holloway appeared by telephone and represented Trident Seafoods and its insurer (Employer). Office Assistant Kimberly Weaver testified for the Division. The record closed at the hearing's conclusion on November 9, 2021.

After the hearing was scheduled, Employee requested a venue change from Anchorage to Juneau. Ordinarily, a venue change would be heard as a preliminary matter on the written record, and if granted would require a continuance so the hearing could be held in the new venue. However, about 25 minutes prior to hearing, Employee called the Division, spoke to Weaver and asked why no one had called him for the hearing. Weaver informed Employee there was a time-zone difference and the hearing chair would call him at the proper time. About 11 minutes later, a woman, thought to be Adely Martinez, called Weaver and said Employee had just been “assaulted,” was filing a police report, needed to seek medical attention and wanted to reschedule the hearing. Weaver referred the caller to Workers’ Compensation Officer Julie Kelley. This exchange caused a second basis to address Employee’s continuance request.

Employer opposed the continuance; after the panel continued the hearing Employer wanted an order requiring Employee to participate in mediation; it also wanted the evidentiary record “frozen” effective November 9, 2021. Oral orders granted the continuance and “froze” the evidentiary record effective November 9, 2021, but denied the mediation request. This decision examines the oral orders and explains general procedures for future hearings.

ISSUES

Employee requested a continuance; Employer opposed it. An oral order granted the continuance.

1) Was the oral order granting a continuance correct?

After the oral order continued the hearing, Employer asked for an order requiring Employee to participate in mediation, and an order “freezing” the evidentiary record to prevent him from gaining an unfair advantage by using Employer’s hearing brief and evidence to improve on his presentation and arguments at the eventual merits hearing.

Employee disconnected from the conference call before Employer made its requests. This decision assumes he opposes them. Oral orders denied the mediation request but granted Employer’s request to “freeze” the evidentiary record.

2) Were the oral orders denying mediation and “freezing” the evidence correct?

FINDINGS OF FACT

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

- 1) On March 31, 2020, Employee through his former counsel timely filed a hearing request on his various claims in two cases. (Affidavit of Readiness for Hearing, March 30, 2020).
- 2) On August 13, 2020, Employee participated in a voluntary mediation with an experienced and highly effective mediator. According to Employee's file, the mediation only "partially resolved" some issues but, given his pending claims, did not resolve all merit issues. (Agency file).
- 3) Given the experience and skill of the mediator, it is unlikely another mediation would resolve Employee's case. (Experience, judgment and inferences drawn from the above).
- 4) On September 21, 2021, the parties attended a prehearing conference at which the designee set Employee's claims for hearing on November 9, 2021. Issues to be heard in Employee's numerous claims from two cases included: a compensation rate adjustment; temporary partial and temporary total disability benefits; permanent partial impairment benefits; a request for an unfair or frivolous controversion finding; medical benefits and related transportation costs; an unspecified penalty; interest; and attorney fees and costs. Also set for hearing was Employee's petition to review the RBA's determination. (Prehearing Conference Summary, September 21, 2021).
- 5) On October 27, 2021, Employee requested a change of venue from Anchorage to Juneau and a hearing continuance or cancellation. He did not provide a hearing request for this petition and did not set forth grounds for the venue change request. (Petition, October 26, 2021).
- 6) On November 1, 2021, Employer timely filed its hearing brief and exhibits and served a copy on Employee. (Hearing brief of Trident Seafoods Corporation, November 1, 2021).
- 7) Employee filed neither a hearing brief nor a witness list. (Agency file).
- 8) On November 9, 2021, about 25 minutes prior to hearing, Employee called the Division and spoke with Office Assistant Weaver. Employee asked Weaver why no one from the Division had called him yet to participate at his hearing. Weaver told Employee that he was too early and had overlooked the time-zone difference between Employee's location and the hearing venue. Weaver had reminded Employee a day prior of the time-zone difference. Employee apologized for his error, laughed, and terminated the call. About 11 minutes later, a woman believed to be Adely Martinez called the Division, spoke with Weaver and advised that Employee had just been "assaulted," was filing a police report, needed medical attention and wanted to continue his

hearing. Weaver forwarded the call to Workers' Compensation Officer Julie Kelley for further instructions; Weaver also advised the hearing chair about Employee's phone call. (Weaver).

9) At 9:00 AM on November 9, 2021, as the hearing commenced, Kelley sent the chair an email:

EE's Case Manager (Adallie [sic] Martinez) at SOUND MENTAL HEALTH called (206) 536-XXXX to advise that EE was going to get support for the Hearing today -- and because he walks funny with his legs -- the security guard accused him of being drunk and yanked his Shoulders and injured him.

He is filing a Police Report right now. (Kelley email, November 9, 2021; phone number redacted for confidentiality).

10) At hearing, the chair called Holloway and Employee and placed them together on a conference call. Before he could be sworn in as a witness, Employee stated in English that he needed to reschedule the hearing; he also demanded a Spanish language interpreter. (Record).

11) The designated chair put the parties on hold while he obtained a Spanish language interpreter to join the conference call; this took several minutes. When the hearing resumed, Employee was no longer on the conference call; he did not call back during the hearing. (Record).

12) The hearing panel addressed Employee's November 9, 2021 continuance request as a preliminary issue. Employer opposed the continuance for several reasons: it doubted Employee's veracity; he had not personally requested a continuance; the person requesting it had not entered an appearance and thus could not speak for him; the request and all related information concerning it were hearsay; and Employee was simply trying to delay the hearing. (Record).

13) Employee's grounds for requesting a hearing continuance were questionable, as he was not present to provide sworn testimony. However, after deliberation, the panel granted Employee's continuance request. (Experience; judgment and inferences from the above; record)

14) After the oral order issued granting Employee's continuance, Employer asked for an order requiring Employee to participate in mediation, and for an order "freezing" the evidentiary record as it was on November 9, 2021. On the latter point, it contended Employee had not filed a brief but had an unfair advantage of having received Employer's hearing brief with all attachments and could use those arguments and that evidence to unfairly bolster his presentation

at a later hearing. After deliberation, the panel denied Employer’s mediation request but granted its request to “freeze” the evidentiary record effective November 9, 2021. (Record).

PRINCIPLES OF LAW

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

....

(2) workers’ compensation cases shall be decided on their merits except where otherwise provided by statute;

....

(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 23.30.110. Procedure on claims. . . .

....

(h) The filing of a hearing request under (c) of this section suspends the running of the two-year time period specified in (c) of this section. However, if the employee subsequently requests a continuance of the hearing and the request is approved by the board, the granting of the continuance renders the request for hearing inoperative, and the two-year time period specified in (c) of this section continues to run again from the date of the board’s notice to the employee of the board’s granting of the continuance and of its effect. If the employee fails to again request a hearing before the conclusion of the two-year time period in (c) of this section, the claim is denied.

8 AAC 45.070. Hearings. . . .

....

(b) Except as provided in (1)(A) of this subsection and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an

Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

(A) For review of an administrator's decision issued under AS 23.30.041, a party shall file a petition asking for review of the administrator's decision. An affidavit of readiness for hearing form is not required. In reviewing the administrator's decision, the board may not consider evidence that was not available to the administrator at the time of the administrator's decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator's consideration.

....

(C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.

(D) On a venue dispute, a party must file a petition asking the board to determine the venue and an affidavit of readiness for hearing on the written record. In accordance with 8 AAC 45.072, the board will consider the parties' written arguments and evidence in the case file, and an in-person hearing will not be held.

....

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. . . .

8 AAC 45.072. Venue. A hearing will be held only in a city in which a division office is located. Except as provided in this section, a hearing will be held in the city nearest the place where the injury occurred and in which a division office is located. The hearing location may be changed to a different city in which a division office is located if

- (1) the parties stipulate to the change;
- (2) after receiving a party's request in accordance with 8 AAC 45.070(b)(1)(D) and based on the documents filed with the board and the parties' written arguments, the board orders the hearing location changed for the convenience of the parties and the witnesses; the board's panel in the city nearest the place

where the injury occurred will decide the request filed under 8 AAC 45.070(b)(1)(D) to change the hearing's location; or

(3) the board or designee, in its discretion and without a party's request, changes the hearing's location for the board's convenience or to assure a speedy remedy.

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 canceled 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;

. . . .

(C) a party . . . or a material witness becomes ill or dies;

(D) a party . . . or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

. . . .

(N) the board determines that despite a parties due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

. . . .

(c) Except for a continuance or cancellation granted under (b)(1)(H) of this section,

(1) the affidavit of readiness is inoperative for purposes of scheduling another hearing;

. . . .

(3) a party who wants a hearing after a continuance or cancellation has been granted must file another affidavit of readiness in accordance with 8 AAC 45.070.

8 AAC 45.120. Evidence. . . .

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of

any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

ANALYSIS

1) Was the oral order granting a continuance correct?

Over a week prior to hearing, Employee filed a petition seeking a continuance because he also requested a venue change from Anchorage to Juneau. 8 AAC 45.072; 8 AAC 45.074. However, just prior to hearing Employee called Weaver to see why no one from the Division had called him for his hearing. Employee laughed, noted his time-zone error but did not mention an assault. About 11 minutes later, Martinez on his behalf called the Division and told Weaver that Employee had just been assaulted, was discussing the matter with the police, needed medical care and wanted to reschedule his hearing. Employee's hearing-day continuance request through a third-party gave several more bases to consider a hearing continuance. 8 AAC 45.074(b)(A), (C), (D), (N).

Employer questioned whether Employee's account was sincere, and opposed the continuance request. It contended Employee was merely trying to delay the hearing and Martinez lacked authority to speak for him. Employer also contended evidence supporting the request was hearsay and not adequate to support a finding justifying a hearing continuance under 8 AAC 45.120(e).

Because Employee terminated the call while he was on hold waiting for the Spanish interpreter, he was not available to be examined under oath about Martinez's second-hand account. Taking her account at face value, the panel deliberated and an oral order granted Employee's continuance request, noting that had someone on Holloway's behalf called the Division to say he was unable to make it to the hearing due to an accident or injury, that report though hearsay, would have been adequate to support Employer's request for a continuance to avoid "irreparable harm." 8 AAC 45.120(e); 8 AAC 45.074(b)(1)(N). Martinez's account showed Employee, a material witness, was unavailable for hearing; he has a right to testify at his hearing. 8 AAC

45.074(b)(1)(A). Though he reportedly did not become “ill or die,” Employee allegedly getting assaulted and needing medical attention is the functional equivalent. 8 AAC 45.074(b)(1)(C). Employee was participating at hearing by telephone and his alleged assault and need for treatment made him unexpectedly unable to “participate telephonically.” 8 AAC 45.074(b)(1)(D).

The legislature intends that all parties have their evidence and arguments heard and fairly considered. While continuing the hearing necessarily caused delay and may increase Employer’s costs somewhat, Employee’s due process rights to a fair hearing trump those valid but relatively minimal considerations. AS 23.30.001(2), (4). The oral order continuing the hearing under these circumstances was correct.

2) Were the oral orders denying mediation and “freezing” the evidence correct?

After the oral order continued the hearing, Employer sought an order requiring Employee to participate in mediation, and a separate order “freezing” the evidentiary record as it stood on November 9, 2021. Since Employee had already participated unsuccessfully in mediation with an experienced and talented mediator, the request for an order requiring him to participate in mediation again, was denied as not likely to succeed. *Rogers & Babler*.

Because Employee had not filed a brief but Employer had, Employer’s request for an order “freezing” the evidentiary record as it stood on November 9, 2021, was granted. Though Employee is entitled to a hearing where his evidence and arguments will be heard and fairly considered, his rights are not without limitations under these circumstances. Since Employee terminated his appearance while he was on hold waiting for an interpreter, he was unavailable to be questioned under oath about Martinez’s second-hand account of his “assault” and need for emergent care.

Employer set forth its hearing arguments and supporting evidence at length in its brief and attached hundreds of pages of medical documentation. Given the unverified assault and claimed need for medical care, it would be unfair to allow Employee or a representative to go through Employer’s brief and exhibits, pick apart its arguments and evidence and attempt to bolster his

presentation at a future hearing with new evidence. Just as Employee has a right to be present and heard and for his evidence and arguments to be considered fairly, so does Employer. AS 23.30.001(2), (4). Therefore, the oral order granting Employer's request to freeze the evidentiary record effective November 9, 2021, was correct. Though as a party Employee may testify at a future merits hearing, he cannot present additional witnesses or written arguments or evidence not previously filed and served in his case as of November 9, 2021, on the issues set for hearing on that date.

A venue change is a preliminary matter that must be decided before Employee's claims or other matters can be heard on their merits. As 20 days have elapsed since Employee filed and served his petition for a venue change, he will be directed to file an Affidavit of Readiness for Hearing on his October 26, 2021 petition to change venue. The parties will then be directed to attend a prehearing conference at which the designee will schedule a written record hearing on the venue change issue. Since the venue change petition was not set for hearing on November 9, 2021, Employee will be allowed to set forth his grounds for changing venue from Anchorage to Juneau in writing as his "brief" for that hearing; he is advised that there will be no in-person hearing and no testimony taken at the venue change hearing. 8 AAC 45.070(b)(1)(D).

Since Employee's continuance was granted over Employer's objection, his March 30, 2020 hearing request filed on March 31, 2020 is rendered "inoperative." AS 23.30.110(h). Once the venue petition is decided on the written record, if he wants to schedule a hearing on his various claims in his two cases, Employee must file a separate hearing request for each case and for each claim. 8 AAC 45.070(b)(1)(C), (D); 8 AAC 074(c)(1), (3). A separate hearing request is not necessary to set his RBA "appeal" on for hearing. 8 AAC 45.070(b)(1)(A). The designee will be directed to explain this process to Employee in detail at the next prehearing conference.

CONCLUSIONS OF LAW

- 1) The oral order granting a continuance was correct.
- 2) The oral orders denying mediation and "freezing" the evidence were correct.

ORDER

- 1) The November 9, 2021 hearing is continued.
- 2) Employee shall file an Affidavit for Readiness for Hearing on his October 26, 2021 petition to change venue. Thereafter, the parties shall attend a prehearing conference at which a written record hearing will be scheduled limited to the venue change from Anchorage to Juneau. The parties may file briefs for use at the written record hearing, limited to the venue change issue.
- 3) The designee at the next prehearing conference is directed to explain this process to Employee and set a briefing deadline and a written record hearing date.
- 4) After the venue change issue is decided, when Employee is ready for a merits hearing on his various claims in his two cases, he must file new hearing requests in accordance with this decision.
- 5) His “appeal” from the RBA’s decision shall be set at the same time as his merits claims.
- 6) The designee at the next prehearing conference is directed to explain this process to Employee.

Dated in Anchorage, Alaska on November 23, 2021.

ALASKA WORKERS’ COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Randy Beltz, 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 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 Jose R. Iniguez Quinonez, employee / claimant v. Trident Seafoods, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201614882M; 201603968; 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 November 23, 2021.

/s/

Kimberly Weaver, Office Assistant II