

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DEVON BETTS,)
)
) Employee,)
) Claimant,)
)
) v.) INTERLOCUTORY
) DECISION AND ORDER
)
) GREENLING ENTERPRISES, LLC,) AWCB Case No. 201514088
)
) Employer,) AWCB Decision No. 23-0019
) and)
)
) ALASKA NATIONAL INSURANCE,) Filed with AWCB Juneau, Alaska
) on April 4, 2023
)
) Insurer,)
)
) Defendants.)
)

Devon Betts' (Employee) December 22, 2022 amended petition to stay the second independent medical evaluation (SIME) was heard on March 21, 2023, on the written record in Juneau, Alaska, a date selected on March 2, 2023. A February 3, 2023 hearing request gave rise to this hearing. Attorney David Graham represented Employee. Attorney Nora Barlow represented Greenling Enterprises, LLC, and Alaska National Insurance (Employer). The record closed on March 21, 2023.

ISSUE

Employee requests an order staying the SIME ordered in *Betts I* until proceedings before the Alaska Supreme Court (Court) end. She contends irreparable damage will result if a stay is not granted. Employee contends scheduling an SIME will interfere with and frustrate the Court's jurisdiction over her pending petition for review as the issue raised in her petition for review will

become moot if the SIME takes place prior to the Court’s review of her petition. She contends an SIME will require her to travel at “a great personal inconvenience and cost” even though the Court may reverse or modify *Betts I*. Employee contends an SIME would provide Employer “another otherwise unavailable bite at the apple in their ongoing efforts to deny compensation Employee is entitled to receive as a matter of law” as Employer’s medical evaluation (EME) reports failed to rebut the presumption. She contends moving forward with an SIME will waste time and resources if her petition for review is granted and the SIME ordered in *Betts I* is reversed. Employee contends Barlow misused and misrepresented the scope of the medical release in the June 28, 2022 letter to a medical provider, which caused delay and confusion in the SIME process and invaded her privacy. She contends a stay is an appropriate sanction for Employer’s misrepresentation. Employee contends Appellate Procedure Rule 205 necessitates she request a stay with the Board before requesting it with the Court.

Employer contends the Alaska Workers’ Compensation Act (Act) provides the Alaska Workers’ Compensation Appeals Commission (Commission) with authority to stay *Betts I*. It contends the Alaska Appellate Rules govern applications to stay *Betts I* and requires a party to first request a stay from the Commission. Employer contends Employee failed to properly request a stay because he failed to request it with the Commission as directed. Alternatively, it contends Employee failed to identify irreparable harm and serious and substantial questions. Employer requests an order denying Employee’s request for a stay of the SIME ordered in *Betts I*.

Should the SIME ordered in *Betts I* be stayed?

FINDINGS OF FACT

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

- 1) On June 28, 2022, Patrick Carnahan from Barlow’s law office requested medical documents from Island Primary Care-Orcas in a letter along with a release signed by Employee:

Enclosed is a medical release authorizing our firm to receive medical documents relating to the above patient. This includes any surgical photographs and/or surgical videos.

Please research your records concerning this patient and send single-sided copies of all the medical records including photographic identification, intake forms, patient paperwork, phone logs, records, prescription logs, prescriptions, reports, notes, chart notes, letters, photographs, color surgical photos, surgical videos, test reports or results (including as applicable, physical test results, pathology test results, laboratory test results, x-rays, MRI & CAT scans, EMGs, EKGs, sonograms, etc.), bills, and referral letters in your possession, whether generated by you or received from a third party. **If possible, please provide all records by e-mail to service@barlowanderson.com. Please provide radiographic films and/or diagnostic studies and disc format mailed to the address above.**

Attached is a Statement of Custodian of Records which should be signed and returned with the records. This document states that copies of all records regarding the patient have been sent and that they are true and correct. If there are no documents, please indicate so on the attached statement of custodian of records and return to our office by facsimile or mail. **If you require pre-payment for the records, please fax or e-mail an invoice. Otherwise, please bill us for any reasonable copying costs and note that our office requires pre-authorization for any charges over \$150 for these services. . . .** If you have any questions concerning this request, please call.

The release authorized Employee's physician to provide medical records to Barlow's office for treatment of the "2013 work injury or illness at work, and the following parts of my body, diagnoses or conditions, organ systems, chief complaints and/or symptoms: low back, lumbar spine, demyelinating neuropathy." (Letter, June 28, 2022; Release of Medical Information).

2) On July 26, 2022, Employee testified at hearing she has not used her private insurance to obtain the recommended medical treatment because her physician is out-of-network, and she cannot afford the associated travel costs. She lives on an island and has to take a ferry to the mainland and then travel by vehicle to obtain the medical treatment. The ferry is cancelled often and overnight stays may be required. The injections require her to travel longer distances by vehicles so Employee would have to stay overnight. She cannot afford to pay for the travel costs out-of-pocket. (Employee).

3) On August 23, 2022, *Betts v. Greenling Enterprises, LLC*, AWCB Dec. No. 22-0056 (August 23, 2022) (*Betts I*), granted Employer's petition for an SIME with a neurologist, orthopedic surgeon and pain management specialist for causation and treatment disputes, directed the parties to appear before a Board designee for a prehearing conference as soon as possible to schedule dates for the parties to present medical records for the SIME physician, and cancelled a scheduled merits hearing. It also denied Employee's request for interim benefits. Employee

contended Employer's EME reports failed to rebut the presumption and a SIME unreasonably delays medical treatment. *Betts I* found there are several "competing" causes of Employee's medical treatment needs, including lumbar spine disc disease and demyelinating polyneuropathy. It acknowledged an SIME will postpone a merits hearing, but was the best manner to ascertain the parties' rights and assist to resolve Employee's claim. *Betts I* found awarding interim medical benefits before Employee's claim was heard would not protect the parties' due process rights and her request was denied. (*Betts I*).

4) On September 7, 2022, Employee requested reconsideration of *Betts I* but did not request a stay. (Employee's Petition for Reconsideration of the Interlocutory Decision and Order Granting SIME, September 7, 2022).

5) On October 10, 2022, Employee requested the Commission review *Betts I*. (Employee's Petition for Review of Interlocutory Decision and Order Granting SIME, October 10, 2022).

6) On November 17, 2022, Workers' Compensation Officer Byers emailed the parties, "The employee **must** either file a motion for stay with the commission or an affidavit of review and completeness of the SIME records with the board. . . ." (Email, November 17, 2022).

7) On November 23, 2022, Employee requested a stay of the SIME until the Commission proceedings ended. (Employee's Petition to Stay SIME Order, November 23, 2022).

8) On November 28, 2022, Employer opposed Employee's petition for a stay. It contended she provided no authority which would allow a *Betts I* stay. Employer also contended Employee reasserted arguments *Betts I* already rejected. It contended Byers properly informed Employee she must request a stay with the Commission, and attached the November 2, 4, 16 and 17 emails between the parties and Byers as exhibits. (Employer's Opposition to Employee's Petition for Stay SIME Order, November 28, 2022; Email, November 4, 2022).

9) On November 30, 2022, the Commission denied Employee's request for review. *Betts v. Greenling Enterprises, LLC*, AWCAC Dec. No. 22-0056 (November 30, 2022) (*Betts II*).

10) On December 12, 2022, Employee asked the Court to review the Commission's November 30, 2022 order denying review of *Betts I*. She requested orders finding Employer failed to rebut the raised presumption, reversing *Betts I*'s order for an SIME, and granting her claim for interim benefits. (Employee's Petition for Review of Order Denying Review of D&O Granting SIME, Denying Interim Benefits and Vacating a Merits Hearing, December 12, 2022).

11) On December 22, 2022, Employee requested an order staying *Betts I*'s order for an SIME until termination of proceedings before the Court. She contended irreparable damage would result if a stay was not granted because she would be required to travel at "a great personal inconvenience and cost" even though the Court may reverse or modify *Betts I*; Employer should not get "another otherwise unavailable bite at the apple in their ongoing efforts to deny compensation Employee is entitled to receive as a matter of law" as Employer's evidence failed to rebut the presumption; Barlow misused and misrepresented the scope of the release in the June 28, 2022 letter which added delay, confusion and invaded Employee's privacy and a stay would be appropriate sanction. Employee contended Appellate Procedure Rule 205 necessitates she request a stay with the Board first. (Employee's Amended Petition to Stay SIME Order, December 22, 2022).

12) On January 24, 2023, *Betts v. Greenling Enterprises, LLC*, AWCB Dec. No. 23-0006 (January 24, 2023) (*Betts III*) ordered the SIME process to proceed without Employee's affidavit of review and completeness of SIME records and ordered Employer to remove medical records from the SIME binder it agreed were not relevant. (*Betts III*).

PRINCIPLES OF LAW

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.

(c) If a compensation order is not in accordance with law or fact, the order may be suspended or set aside, in whole or in part, through proceedings in the commission brought by a party in interest against all other parties to the proceedings before the board. The payment of the amounts required by an award may not be stayed pending a final decision in the proceeding unless, upon application for a stay, the commission, on hearing, after not less than three days' notice to the parties in interest, allows the stay of payment, in whole or in part, where the party filing the application would otherwise suffer irreparable damage. Continuing future periodic compensation payments may not be stayed without a showing by the appellant of irreparable damage and the existence of the probability of the merits of the appeal being decided adversely to the recipient of

the compensation payments. The order of the commission allowing a stay must contain a specific finding, based upon evidence submitted to the commission and identified by reference to the evidence, that irreparable damage would result to the party applying for a stay and specifying the nature of the damage.

(d) Proceedings for reconsidering, suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, may not be instituted, except as provided in this chapter.

Monzulla v. Voorhees Concrete Cutting, 254 P.3d 341 (Alaska 2011) held the Commission has jurisdiction to stay a Board order denying the employer’s petition to change venue while the Commission reviewed the decision.

The Act does not provide the Board the authority to stay a benefits award pending an appeal. *Flayac v. Banner Health Systems*, AWCB Dec. No. 10-0124 (July 16, 2010); *Cornelison v. Rappe Excavating*, AWCB Dec. No. 13-0060 (May 30, 2013). Rather, that authority is granted to the Commission under AS 23.30.125(a). *Id.* However, absent express statutory authority to issue stays under the Act, *Cornelison* found authority for the Board to stay its own proceedings under the Alaska’s Administrative Procedures Act (APA) before the decision became effective. *Id.* *But see, Johns v. State of Alaska, Dept. of Highways*, 431 P.2d 148; 152 (defining “irreparable damage” under AS 23.30.125(c): “We . . . hold that AS 23.30.125(c) is applicable solely to injunction proceedings in the superior court, and that the exclusive method of enforcing compensation orders is provided for in AS 23.30.125(c) and AS 23.30.170.”).

Workers’ compensation award appeals were previously pursued in Superior Court and §125(c) afforded the application of a stay pending appeal. *Johns* at 151. Under §125(c), the term “irreparable damage” is a highly debatable issue. *Id.* A claimant’s financial irresponsibility is not sufficient grounds upon which to base a finding of irreparable injury. *Id.* To warrant enjoining payments, the employer must produce evidence not only of the claimant’s financial irresponsibility but must also demonstrate the existence of the probability of success on the merits of the appeal. *Id.*; *Wise Mechanical Contractors v. Bignell*, 626 P.2d 1085; 1087 (Alaska 1981) (reiterating its holding in *Johns*). The “balancing of hardships” approach, requiring both the claimant’s financial irresponsibility and the probability of success on the merits of the appeal, is based on the presumption an employee is inadequately protected for continuing benefits.

Olsen Logging Co. v. Lawson, 832 P.2d 174, 176 (Alaska 1992). However, the balance is different in most cases involving lump sum benefits, so the lesser “serious and substantial questions” standard is used. *Id.*

AS 23.30.128. Commission proceedings. . . .

(c) The commission may hold hearings and receive evidence on applications for (1) stays under AS 23.30.125. . . . The commission may rely on new or additional evidence presented during the hearing in making its decision on the application.

AS 23.30.129. Judicial review of commission orders. (a) Notwithstanding the provisions of AS 44.62.560, orders of the commission may not be appealed to the superior court. Consistent with AS 22.05.010(b), final decisions of the commission may be appealed to the supreme court, and other orders may be reviewed by the supreme court as provided by the Alaska Rules of Appellate Procedure.

. . . .

Fischback & Moore of Alaska, Inc. v. Lynn, 407 P.2d 174, 176 (Alaska 1965), stated in respect to an administrative agency’s jurisdiction when its decision is appealed:

It is the general rule that when an order of an administrative agency is appealed to a court, the agency’s power and authority in relation to the matter is suspended as to questions raised by the appeal. (Citation omitted). The rule is based on common sense. If a court has appellate jurisdiction over a decision of an administrative body, it would not be consistent with the full exercise of that jurisdiction to permit the administrative body also to exercise jurisdiction which would conflict with that exercised by the court. The court’s jurisdiction over the subject matter of an appeal must be complete and not subject to being interfered with or frustrated by concurrent action by the administrative body.

Operation of the rule is limited to situations where the exercise of administrative jurisdiction would conflict with the proper exercise of the court’s jurisdiction. If there would be no conflict, then there would be no obstacle to the administrative agency exercising a continuing jurisdiction that may be conferred upon it by law.

Whether, or to what extent, the Board retains jurisdiction hinges on the questions raised by the appeal. In *Pietro v. Unocal Corporation*, AWCB Dec. No. 11-0132 (August 25, 2011), the employee argued the Board retained jurisdiction during an appeal to the Commission. The issue on appeal was compensability of the employee’s injuries. The Board determined it did not have jurisdiction, because the issues before it were wholly dependent on the issues in the appeal. On

the other hand, in an earlier case the Board found it had jurisdiction over a claim for attorney fees where the appeal was limited to the correctness of the compensation rate. *Barnes v. State of Alaska*, AWCB Dec. No. 84-0130 (May 10, 1984).

AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions. (a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120-11.46.150.

....

AS 44.62.520. Effective date of decision; stay. (a) A decision becomes effective 30 days after it is delivered or mailed to the respondent unless

- (1) a reconsideration is ordered within that time;
- (2) the agency itself orders that the decision become effective sooner; or
- (3) a stay of execution is granted for a particular purpose and not to postpone judicial review.

(b) A stay of execution may be included in the decision or, if not included in it, may be granted by the agency at any time before the decision becomes effective. .

..

AS 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. 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. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

....

8 AAC 45.090. Additional examination. . . .

(b) Except as provided in (g) of this section, regardless of the date of an employee's injury, the board will require the employer to pay for the cost of an examination under AS 23.30.095(k), AS 23.30.110(g), or this section.

....

Alaska Appellate Procedure Rule 201.1. Appeals from the Alaska Workers' Compensation Appeals Commission. (a) Part Two of these rules (Rules 201 through 220) applies to appeals as of right to the supreme court from a final decision of the Alaska Workers' Compensation Appeals Commission under AS 23.30.129.

(b) The "trial court" referred to in Part Two of these rules includes the Alaska Workers' Compensation Appeals Commission, if that commission entered the decision being appealed under AS 23.30.129.

(c) The "judgment" referred to in Part Two of these rules includes the final decision of the Alaska Workers' Compensation Appeals Commission, if that commission entered the decision being appealed under AS 23.30.129.

Alaska Appellate Procedure Rule 205. Stays Pending Appeal in Civil Cases. In a civil case, the supreme court or a justice thereof may stay the enforcement or effect of the judgment appealed from or the proceedings in the trial court upon such terms as to bond or other matters as may be proper. A motion for a stay will normally not be considered by the supreme court unless application has previously been made to the trial court and has been denied, or has been granted on conditions other than those requested.

Alaska Appellate Procedure Rule 401.1. Review of Non-Appealable Orders or Decisions from the Alaska Workers' Compensation Appeals Commission. (a) Part Four of these rules (Rules 401 to 408) applies to petitions for review of non-appealable orders or decisions from the Alaska Workers' Compensation Appeals Commission.

(b) The court referred to in Part Four of these rules includes the Alaska Workers' Compensation Appeals Commission, if that commission entered the order or decision for which review is sought.

(c) For petitions for review covered by this rule, the procedures governing the Workers' Compensation Appeals Commission should be referenced when Part Four refers to a particular Alaska Rule of Civil Procedure.

Alaska Appellate Procedure Rule 405. Relief Available; Applications for Stay.

(b) **Stay.** Court proceedings or the enforcement of any court order or decision shall not be stayed by the filing of a petition for review or of an original application for relief unless that court or the appellate court, or a justice or judge thereof, so orders. Application for stay will be granted by the appellate court or a justice or judge thereof only in accordance with Rule 205 or 206.

ANALYSIS

Should the SIME ordered in *Betts I* be stayed?

a) This panel lacks authority to stay *Betts I*.

The Act provides the Commission authority to issue a stay when reviewing *Betts I*; there is no provision under the Act permitting this panel to stay a decision. AS 23.30.125(c); *Monzulla*. The APA authorizes this panel to issue a stay before *Betts I* became effective. AS 44.62.520(b). *Betts I* was issued on August 23, 2022; it became effective September 22, 2022. AS 23.30.125(a); AS 44.62.540(a). Employee’s November and December 2022 requests to this panel for a stay were untimely. AS 23.30.125(a), (c); AS 44.62.540(a); *Monzulla*.

Betts I ordered an SIME; it was an interlocutory decision. In *Betts II*, the Commission denied Employee’s petition for review; it too was a non-appealable order. Employee contended Appellate Rule 205 necessitates she request a stay from this panel before requesting it from the Court. Employer contended Appellate Rule 205 requires her to request a stay with the Commission, not this panel. AS 23.30.129(a) states, “final decisions of the commission may be appealed to the supreme court, and other orders may be reviewed by the supreme court as provided by the Alaska Rules of Appellate Procedure.” Appellate Rule 401.1(a) states Appellate Rule 405 applies to non-appealable orders or decisions from the Commission. As *Betts I* was interlocutory and *Betts II* denied Employee’s petition for review, both were non-appealable, and Rule 405 applies. Appellate Rule 405 states non-appealable decisions and orders shall not be stayed upon the filing of a petition for review unless “that court or the appellate court” so orders in accordance with Rule 205. Rule 401.1(b) defines “court” as the Commission. Thus, Appellate Rule 405 allows the Commission to grant a stay in accordance with Rule 205, not this panel. Employee should have requested a stay with the Commission, as she was directed.

Appellate Rule 205 provides “the supreme court” may “stay the enforcement or effect of the judgment appealed from or the proceedings in the trial court” but the stay motion will normally not be considered unless application was previously made to the “trial court.” Appellate Rule 201.1(b) states the “trial court” includes the Commission. Therefore, Rule 205 allows the Court to grant a motion for a stay but the motion will not normally be considered unless it was made to the Commission. Consequently, Rule 205 does not require Employee to request a stay with this panel; rather, it provides the Court may consider a request for a stay, but such a request would not normally be considered unless it was previously made to the Commission. Therefore, there is no stay provision in the Act, so the APA applies and neither it nor the Alaska Appellate Rules permit this panel to consider a stay of *Betts I* after it became effective. AS 23.30.125; AS 23.30.128(c); AS 23.30.129; AS 44.62.540(a); App. Rule 205 and 405; *Monzulla*; *Flayac*; *Cornelison*.

b) Employee failed to prove irreparable harm or serious and substantial questions.

Alternatively, even if this decision could consider a stay, Employee failed to prove irreparable harm or serious and substantial questions. *Johns*; *Bignell*. She contended scheduling an SIME would interfere with and frustrate the Court’s jurisdiction over her pending petition for review as the issues raised in her petition for review will become moot if the SIME takes place prior to the Court’s review of her petition. Employee’s December 12, 2022 petition for review requested an order granting interim benefits because she contended Employer’s EME reports failed to rebut the presumption of compensability -- a contention rejected in *Betts I* -- and reversal of the SIME ordered in *Betts I*. This panel’s authority over an order is suspended as to questions raised by Employee’s petition to review as the panel cannot take actions which would interfere with or frustrate the Court’s jurisdiction. AS 23.30.129(a); *Lynn*; *Pietro*; *Barnes*. Proceeding with an SIME as ordered in *Betts I* does not interfere with or frustrate the Court’s jurisdiction over her pending petition for review as it does not make the Court’s review more difficult or ineffectual. Should she prove successful on her petition for reversal of the ordered SIME in *Betts I* after the SIME is completed, Employee may request the Board strike from the record and disallow consideration of the SIME reports. It does not constitute irreparable harm to proceed with the SIME because Employee may be successful on her petition for review.

Employee contended an SIME will require her to travel at “a great personal inconvenience and cost” and is a waste of time and resources if the Court reverses *Betts I* denial of interim benefits and ordered SIME. Employee previously testified she had not obtained the medical treatment recommended by her physician because it required out-of-pocket costs for travel from her home which she could not afford. Employer is required to arrange and pay for Employee’s transportation, room and board for the SIME. 8 AAC 45.090(b). She provided no additional evidence of “a great personal inconvenience and cost” for traveling to the SIME. While traveling to an SIME may be inconvenient to Employee, the evidence provided does not constitute irreparable harm. Employee also contended an SIME provides Employer “another otherwise unavailable bite at the apple in their ongoing efforts to deny compensation Employee is entitled to receive as a matter of law.” *Betts I* held the SIME panel is the best manner to ascertain the parties’ rights and to assist in resolving Employee’s claim. It found significant disagreement between Employee’s treating physicians and EME physician’s regarding causation and the kind and nature of proposed medical treatment. *Betts I* also found an SIME will assist to understand the symptoms and treatment of demyelinating peripheral polyneuropathy, an uncommon diagnosis in workers’ compensation cases, medical treatment and whether there was overlap with her low back complaints. It does not constitute irreparable harm to proceed with the SIME prior to the Court’s review of her petition.

Employee contended a stay is an appropriate sanction for Employer’s misrepresentation of the scope of the medical release in the June 28, 2022 letter to a medical provider, which caused delay and confusion in the SIME process and invaded her privacy. AS 23.30.250(a) provides for punishment under Alaska criminal law for misleading acts. An order staying a panel SIME is not an appropriate punishment provided for under AS 23.30.250(a). Employee failed to prove irreparable harm or serious and substantial questions. The SIME ordered in *Betts I* should not be stayed, and Employee’s December 22, 2022 amended petition to stay the SIME will be denied.

CONCLUSION OF LAW

The SIME ordered in *Betts I* should not be stayed.

ORDER

