

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

EMILIO PAREDES,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	
)	AWCB Case No. 202012564
AUGUSTINE ENTERPRISES, LLC,)	
)	AWCB Decision No. 23-0034
Uninsured Employer,)	
)	Filed with AWCB Anchorage, Alaska
and)	on June 9, 2023
)	
ALASKA WORKERS' COMPENSATION)	
BENEFITS GUARANTY FUND,)	
)	
Defendants.)	

Emilio Paredes' (Employee) claim was to be heard in Anchorage, Alaska, on May 25, 2023, a date selected on May 3, 2023. A February 2, 2023 hearing request gave rise to this hearing. Uninsured employer Augustine Enterprises, LLC's (Employer) petition for a continuance was heard on May 25, 2023, a date selected on May 15, 2023. A May 5, 2023 petition gave rise to this hearing. Attorney Elliott Dennis appeared and represented Employee. Henry Lee, non-attorney representative, appeared and represented Employer. McKenna Wentworth, Claims Administrator, and Velma Thomas, Program Manager, appeared and represented the Alaska Workers' Compensation Benefits Guaranty Fund (Fund). After "board inquiry," good cause was found to continue the hearing. This decision examines the oral order continuing the hearing for additional evidence and gives the parties further direction. The record remained open at the hearing's conclusion for Employee to refile his brief's Exhibit 9. The record closed on May 31, 2023.

ISSUE

Employer contended it did not timely receive hearing notice or any other documents served upon it through the United States Postal Service (USPS)

Employee contended no “good cause” reasons for a continuance exist and Employer’s request should be denied.

The Fund did not oppose a continuance because Employee had not attended a scheduled employer’s medical evaluation (EME) due to illness and the rescheduled EME had not yet occurred. It contended this is a medically complex case and the medical records do not demonstrate a preliminary link between Employee’s employment and an injury or that any pre-existing conditions were aggravated by his employment. The Fund contended if the hearing is not continued, the presumption analysis should not be conducted, and the record be left open to permit it to obtain an EME opinion and complete its investigation and discovery.

Was the oral order continuing the hearing correct?

FINDINGS OF FACT

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

1) On March 20, 2020, James Bales, M.D., said Employee “is well known to my clinic and has a past history of complicated pain control with coagulopathy.” Employee had right leg pain and bilateral hand numbness and weakness. He also reported vision changes, headaches and dizziness, tinnitus, nosebleeds, chest pain, shortness of breath, indigestion, heartburn, nausea, abdominal pain and bowel changes, hematuria, stiffness, osteoporosis, back and neck pain, itching, appetite changes, weight changes, malaise, and fatigue. Employee had positive straight leg raise on the right side and sensation in his hands and feet was mildly decreased. Dr. Bales said symptoms in Employee’s hands could be from cervical disease or peripheral nerve entrapment. He referred Employee for a cervical and lumbar magnetic resonance imaging (MRI), and to Eric Kussro, D.O., for electrodiagnostic studies to evaluate neck pain and bilateral upper limb numbness and tingling. Employee was to follow-up in three to six weeks pending testing completion (Chart Note, Dr. Bales, March 20, 2020; Chart Note, Dr. Kussro, September 16, 2020.)

2) On September 16, 2020, Employee reported numbness and tingling affecting both upper limbs including all fingers of both hands “for at least the last year or so.” He said there was no event or injury preceding his symptoms’ onset. Employee said he works as a contractor and may experience numbness in his hands when using driving power tools. He also reported neck pain and stiffness, but no radiating paresthesia or pain. Electrodiagnostic studies showed Employee had bilateral carpal tunnel syndrome, mild on the left, but severe on the right. Dr. Kussro said findings were consistent with a mild old or chronic left C6 or C7 radiculopathy with no denervation of either nerve root. There was no evidence of right or left ulnar or peripheral neuropathy. Employee was directed to use wrist splints and follow-up with Dr. Bales. (Chart Note, Dr. Kussro, September 16, 2020.)

3) On April 24, 2020, Providence Medical Center emergency department evaluated Employee for post-concussive syndrome and chronic sciatica on the right side. (Providence Alaska Emergency Department Note, Dr. Farber, September 29, 2020.)

4) On September 29, 2020, Shannon Farber, M.D., Providence Medical Center emergency department, noted Employee had a history of deep vein thrombosis (DVT) and pulmonary embolism, posttraumatic stress disorder, gastroparesis, and autism disorder. He presented with three complaints. The first, worsening pain in his bilateral wrists as well as numbness and tingling to his hand. Recent electrodiagnostic studies showed he had severe right wrist carpal tunnel syndrome and mild to moderate left wrist carpal tunnel syndrome. Right carpal tunnel surgery was to be scheduled in one month. Dr. Farber said Employee’s symptoms were consistent with carpal tunnel syndrome. He said he was hit by a ladder “approximately one week ago and “complained of right calf pain.” His pain was improving; however, when it worsened, he was concerned for possible DVT. Employee also reported abdominal bloating, chest pain, and shortness of breath. He had a cough, runny nose, blood in his urine, and felt like he had a fever. Employee’s white blood cell and C-Reactive Protein counts were high. He also had a high blood lactate and lactic acid levels. His urine was positive for amphetamines, cannabinoids, opiates, and oxycodone. Employee developed left upper quadrant pain while in the emergency department and appendicitis was suspected. Employee intermittently became very anxious. His pain and anxiety were difficult to control. Because he has an allergy to Ativan, Employee was treated with oxycodone, morphine, and fentanyl, but none improved his symptoms. He was very agitated and would not hold still. Employee reported to undergo a CT in the past, he had to be given ketamine,

which was administered so an abdominal CT could be taken. The CT ruled out acute appendicitis, pericardial and pleural effusion, and pulmonary embolism. It did note hepatic steatosis with hemangiomas, abdominal edema, and emphysema. X-rays revealed his lungs were clear with no acute abnormalities. Right lower extremity ultrasound revealed acute short segment DVT of two branches of Employee's right inner calf muscle vein. His consistent compliance with Lovenox for DVT prior to admission was questioned and Lovenox was administered. Employee was also treated for sepsis of unknown etiology. Lactic acidosis was also of unknown etiology. Dr. Farber discussed Employee's case with critical care intensivist, Shadi Batah, M.D., who recommended Employee be admitted to hospitalist, David Penn, M.D., for further care and evaluation. Employee's hospital admission was made due to "severe sepsis and acute organ dysfunction," sepsis of unknown etiology, lactic acidosis, and shock. Basis for admission did not include either bilateral carpal tunnel syndrome or right lower extremity acute deep vein thrombosis. (Providence Alaska Emergency Department Note, Dr. Farber, September 29, 2020, 9:15 p.m.; Observation.)

5) On October 1, 2020, due to Employee's abdominal pain, embolism and left femoral vein thrombosis, history of pulmonary embolism, and long-term use of anticoagulants, an abdomen pelvis MRI was ordered. The MRI revealed hepatic cysts and a renal cyst. Employee had right and left-sided weakness and a hypotensive reaction to propofol administered for MRI sedation. The reaction was noted to have resolved by October 9, 2020. Employee's chronic right eye congenital ptosis and acute visual disturbance were found to be secondary to dry eyes and eye drops were prescribed by ophthalmologist Chad Bouchard, D.O. Episodic severe pain, with headaches, right eye pain, bilateral extremity pain with hypertension were noted to be secondary to anxiety and psychiatric illness. Employee's intermittent and inconsistent left-sided weakness and paresthesia was thought to be caused by conversion and functional neurological disorders. Carpentry work and the use of vibratory tools and hand tools were noted to be contributing to Employee's bilateral carpal tunnel syndrome. (Muhammad Farooq, M.D., Consult Note, October 1, 2020; Discharge Summaries: Katherine Buddenberg, D.O., October 9, 2020 and Terrin Martinjak, M.D., November 9, 2020.)

6) On October 29, 2020, Employee reported to Employer a September 12, 2020 injury to his shoulders, arms, and legs caused by repetitive use of power tools. Employer was uninsured and the injury was reported to the Fund on October 26, 2020. Employer was uninsured for workers' compensation liability. (First Report of Occupational Injury, October 29, 2020.)

- 7) On November 19, 2020, Employee reported to Employer a ladder fell on him on September 22, 2020, as he was “walking by” and injured his right leg and calf. Employer was uninsured and the injury was reported to the Fund on November 16, 2020. (First Report of Occupational Injury, November 19, 2020.)
- 8) On October 23, 2020, Employee filed claims for each injury reported requesting temporary total disability (TTD), temporary partial disability (TPD), and permanent total disability (PTD) benefits, medical and transportation costs, penalty, interest, and attorney fees and costs. (Claims, October 23, 2020.)
- 9) On December 2, 2020, Employee’s two cases were joined. (ICERS Event Details, December 2, 2020.)
- 10) On December 9, 2020, Mr. Henry appeared on Employer’s behalf. Neither Employer nor the Fund had controverted or filed an answer to Employee’s claim. Parties confirmed they were communicating, and discovery was proceeding forward. The prehearing conference summary says, “Designee explained the adjudications process noting that once discovery is complete, and if a settlement has not occurred, any party may file an affidavit of readiness for hearing (ARH) form to notify the Alaska Workers Compensation Board that a hearing is necessary.” (Prehearing Conference Summary, December 9, 2020.)
- 11) On January 7, 2021, Employee requested a hearing. (Affidavit of Readiness for Hearing, December 21, 2020.)
- 12) On January 28, 2021, an entry of appearance signed by Lee Henry was filed authorizing Gina Moletti to represent him and Employer. (Entry of Appearance, January 28, 2021.)
- 13) On January 29, 2021, Employer filed a petition to compel discovery. It requested “complete” medical summaries for the September 12 and 22, 2020 injuries, including diagnoses, “documentation of disabilities indicated on report of injury dated 10/20/2020,” and Employee’s employment history including previous workers’ compensation claims against other employers. Employer also opposed Employee’s hearing request because discovery had not been completed. (Petition, January 29, 2021; Affidavit of Opposition, January 29, 2021.)
- 14) On February 11, 2021 Employer and the Fund reported communication with Employee had been difficult but releases had been signed and returned to the Fund. The following discussion ensued:

Employee advised that he is attempting to obtain representation but was advised that he cannot do so until a Controversion (denial of benefits) is filed. The WCBF representative advised that a response will be filed shortly along with any discovery documentation that has been gathered since obtaining the noted releases. Employer objected to the filing of a Controversion until adequate discovery documentation has been received. Employee stated that he is being victimized by the adjudications process, discovery is complete, and he was an Employee of Augustine Enterprises on the 9/12/2020 and 9/22/2020 dates of injury. Employee further advised that he had a related surgery two weeks ago and is seeking additional treatment for his Workers Compensation injuries. Employer stated that he received a letter from Power & Power on 2/4/2021 confirming their representation of Employee and noting a 9/29/2020 injury date. Employer further advised that Employee quit his job with Employer on 9/24/2020 and stated that he would be filing the Power & Power letter with the Alaska Workers Compensation Board (AWCB) and the applicable parties shortly. Employee confirmed that 9/29/2020 was the date he was admitted to the hospital, not the dates of his Workers' Compensation injuries, and that Power & Power do not represent him in this Workers' Compensation matter. Employee demanded that a Controversion be issued and a Hearing be set on his 10/23/2020 WCC. Designee explained that discovery must be completed before a Hearing can be set and advised that, in cases like this, the Employee must have an initial hearing to prove (via discovery documentation) Employee/Employer status and that the injuries happened during the course and scope of employment. If the AWCB issues a compensability order, it's at that time that the WCBGF can step in and pay any Workers' Compensation benefits Employee that might be owed. If a compensability order is issued and if parties do not agree on what Workers' Compensation Benefits are owed, then generally, another Hearing will be necessary to determine the same. Employee expressed his frustration with the adjudications process and the amount of time that this case is taking to develop.

(Prehearing Conference Summary, February 11, 2021.)

15) On February 11, 2021, after the prehearing conference, Employee contacted the division to complain about "the process." A workers' compensation officer spent 45 minutes with Employee to explain the process and calm him down. It was noted:

EE was very upset, was yelling and screaming and using profanities. Advised EE that he will need to calm down and let me explain things but if he doesn't and continues to use foul language that he will have to call back when he talk civilly. EE calmed a bit and I was able to explain to EE his ph summary. EE was under the impression that Gina Moletti was an atty w/ BGF. I explained to EE the role of BGF, Velma and McKenna and that his alleged ER is responsible for the claim if found compensable. Explained to EE that BGF will not "step in" or pay benefit unless it was ordered by the board that his claim was compensable, the ER was ordered and defaulted, and a supplemental order was issued by the board for the BGF to pay. EE was upset that McKenna was supposed to give him the

controversion so he can get an attorney but she didn't even attend the prehearing. EE stated that he was trying to get a representation but since everyone took so long that he lost the lawyer he was working with. Explained to EE that he can request another prehearing to check the status of the discovery and see if parties can set a hearing date on his ARH. Suggested to EE to email all parties and cc AWCB on his RFC and inquiry on discovery.

(ICERS, Event Details, Communication, Phone Call, February 11, 2021.)

16) On February 16, 2021, the Fund controverted all benefits. (Controversion Notice, February 12, 2021.)

17) On February 17, 2021, Employee's "active problem list" and the date each problem was first noted included: weakness of both lower extremities, 11/15/2020; functional neurological symptom disorder with mixed symptoms, 10/3/2020; history of recurrent deep vein thrombosis, 4/11/2020; umbilical hernia without obstruction and without gangrene, 4/11/2020; lesion of left kidney, 3/26/2020; degenerative lumbar disc disease, 2/21/2020; lumbar spine neural foraminal stenosis, 2/21/2020; situational elevated blood pressure, 2/21/2020; paroxysmal atrial fibrillation, 11/11/2019; gastroparesis, 9/18/2019; peptic ulcer disease, 9/18/2019; syncope, 9/18/2019; chronic abdominal pain, 12/28/2018; lactic acidosis, 12/28/2018; Asperger's disorder, 9/15/2018; panic disorder, 9/15/2018; chronic midline low back pain with right-sided sciatica, 9/3/2018; severe episode of recurrent major depressive disorder, without psychotic features, 8/30/2018; left breast mass, 1/26/2018; GERD, 1/26/2018; cavernous hemangioma of liver, 1/15/2018; anxiety disorder, 12/11/2015; attention deficit hyperactivity disorder, 12/11/2015; and posttraumatic stress disorder, 12/11/2015. Employee reported an acute vision loss and right eyelid lag after awaking from anesthesia. He also reported to Monica Wright, M.D.:

He has had to put work on hold due to recent carpal tunnel surgery. Has follow-up with Dr. Bale and then will start PT. He reports his chronic pain issues associated with his back and hands were exacerbated by his current job. He was hired by a construction company as a project manager/estimator. When he was hired it was with the understanding that he would be doing desk work only. He told the employer that his health issues prevented him from doing any manual labor. His employer agreed to this arrangement. On his first day on the job (August 10) they were short on crew and he was asked to cover labor tasks. He agreed to this thinking it was just temporary. This turned into manual labor on a daily basis. He used sawzaals [sic] and hammer drills. He had to work on his knees and climb ladders. He was on his knees doing demolition of the floor. He was asked to carry 50-100 lbs of materials. A ladder fell on the back of his legs on Sept 22 and he was

hospitalized 9/29 – 11/9 due to acute on chronic DVT. He has filed a workman's compensation claim. He needs a support letter. . . .

Dr. Wright reviewed notes from Ophthalmic Associates, which indicated Employee's vision loss was secondary to conversion disorder. She also reviewed his hospital and clinical records from Alaska Neurosurgical, which noted Employee's carpal tunnel symptoms acutely worsened one month after he started his new job and the hospital discharge summary said, "carpentry work – vibratory tools and hand tools likely contributing" to carpal tunnel syndrome. Dr. Wright also noted Employee was hospitalized on September 29, 2020 with acute on chronic DVT of his right lower extremity after a ladder fell on him at work on September 22, 2020. (Chart Note, Dr. Wright, February 17, 2021.)

18) On February 23, 2021, Kendal Webb, M.D., Alaska Oncology, said Employee had recurrent thrombosis (blood clots) and will require lifelong treatment with anticoagulants (blood thinners) to prevent further clotting. He said, "had recurrent clots in the setting of trauma in the past and has been advised to avoid settings where he may be at risk for trauma and especially because he is on anticoagulants that predispose him to bleeding." (To Whom It May Concern Letter, Dr. Webb, February 23, 2021.)

19) On February 25, 2021, Stephanie Chen, M.D., said Employee has been under her care since December 2015. She was following him for major depressive disorder, generalized anxiety disorder, posttraumatic stress disorder, attention deficit hyperactivity disorder, and autism spectrum disorder. She said these chronic medical conditions have impacted his daily functioning and ability to work and that he would benefit from Social Security Disability benefits. (To Whom It May Concern Letter, Dr. Chen, February 25, 2021.)

20) On March 8, 2021, Employee spoke with a workers' compensation technician and asked if he was required to attach all his evidence when he requests a hearing. The technician noted, "I explained the ARH process and that a PH will be set and deadlines for briefs will be set at that PH. EE confirmed that he will send a copy of the ARH to all parties." (ICERS, Event Details, Communications, Phone Call, March 8, 2021.)

21) On March 28, 2021, Dr. Wright said Employee experienced severe bilateral carpal tunnel syndrome symptoms' worsening "since starting a new job in construction on 8/10/20 that required regular use of vibrating power tools." She noted he was recovering from a January 27, 2021 right-sided carpal tunnel release and was involved in a work-related accident on September 22, 2020

when a ladder fell on the back of his legs. She said he was hospitalized on September 29, 2020 due to acute on chronic right lower extremity deep vein thrombosis, “likely” triggered by the accident. She mentioned Employee was evaluated by ophthalmology after his hospitalization due to worsening right-sided vision loss and was told the cause was functional weakness. (To Whom it May Concern Letter, Dr. Wright, March 28, 2021.)

22) On April 1, 2021, Employee requested a hearing be scheduled to determine if his injury arose out of and in the course of his employment with Employer. The Fund advised discovery was still outstanding, “specifically related to substantial cause including but not limited to medical records.” It was noted no medical records or other discovery had been filed after the February 11, 2021 prehearing. Employee said he had all the discovery but was advised not to file it until a hearing was scheduled. Once again, it was explained to Employee a hearing would not be scheduled until discovery was complete. (Prehearing Conference Summary, April 1, 2021.)

23) On April 1, 2021, Employee spoke with a workers’ compensation officer. Notes of the conversation and advice given Employee include:

EE was upset about what happened at the prehearing. He was under the impression that he will get a hearing date and stated he discovered he was supposed to give all his records to the BGF and that they didn’t do any of their own discovery. EE also stated that he was advised that he doesn’t turn in any paperwork to us until the deadline for evidence, brief and witness deadline is given. EE expressed his frustration towards the prehearing officer and asks if there’s a way to change to a different board designee. After EE calmed down a bit, I explained to EE the following:

1. Discovery means exchange of information - in fact, I reminded EE from our last conversation that if he knew what records ER/BGF was asking and he has ability to get them quicker to go ahead and get it and give it to ER/BGF. EE stated he doesn’t want to do that because he’ll be revealing all his cards. I explained to EE that there’s no such thing as secret file. All three records should be the same, EE, ER/BGF and AWCB.

2. Explained to EE the difference between normal discovery and evidence, witness list and brief filed before a hearing when a hearing is set. EE again stated that his intent is to submit things at the last minute so ER/BGF doesn’t have an opportunity to come up with other excuses/reasons based on his evidence.

3. Informed EE of his right to petition to recuse a prehearing officer/hearing officer if he feels that they are not being fair or biased towards a party.

EE pretty much complained of the process and the prehearing and how he is not able to get a hearing date.

(ICERS, Event Details, Communications, Phone Call, April 1, 2021.)

24) On May 5, 2021, Employee requested an unidentified homeowner be joined as a defendant. (Petition, May 5, 2021.)

25) On May 6, 2021, Darryl Thompson attended a prehearing on Employer's behalf, but had not entered his appearance. He said he would be filing one "shortly." Employee said he would file discovery documentation soon. The Fund advised a medical summary and medical records would be filed. It was verified no medical records or any other discovery documents have been filed by any party and, therefore, the designee did not schedule a hearing. Parties were advised to complete discovery and then request another prehearing to address Employee's January 7, 2021 hearing request. (Prehearing Conference Summary, May 6, 2021.)

26) On May 6, 2021, the Fund filed the first medical summary. It contained only 38 pages and did not include medical records from Employee's hospital admission from September 29 to November 9, 2020. (Medical Summary, May 6, 2021.)

27) On December 7, 2021, Dr. Chen said major depressive disorder, generalized anxiety disorder, posttraumatic stress disorder, attention deficit and hyperactivity disorder, autism spectrum disorder impacted multiple aspects of Employee's daily functioning, relationships, and work. She said these conditions have made him vulnerable, and she thought he would benefit from a public advocate to support him in the community and protect him from further psychological harm. (To Whom It May Concern Letter, Dr. Chen, December 7, 2021.)

28) On September 8, 2022, Elliott Dennis entered his appearance on Employee's behalf. (Entry of Appearance, September 8, 2022.)

29) On September 8, 2022, Employee filed two claims against Lee Henry d/b/a Guild Construction and two amended claims against Augustine Enterprises, LLC, d/b/a Guild Construction. All four claims seek TTD, PTD, PPI, and AS 23.30.041(k) benefits, medical and transportation costs, a compensation rate adjustment, penalty, interest, a frivolous and unfair controversion finding, and attorney fees and costs. One claim and one amended claim describe the nature of the injury as "injuries to legs, arms, wrists, shoulders, back, neck and spine; increased severity of carpal tunnel syndrome. EE was required to perform physical construction work though he was hired to perform project management, bid preparation and other nonphysical work for ER's

construction company.” One claim and one amended claim describe the nature of the injury as “EE was working for ER, when a letter fell, striking his calf. He developed DVT resulting in hospitalization. While hospitalized EE suffered an adverse reaction to anesthesia, resulting in blindness in his right eye and paralysis. He suffers a broken wrist from overuse. He has been diagnosed with conversion disorder. EE is permanently disabled.” One of the listed reasons this amended claim was filed is, “ER is owned and controlled by Lee Henry. He is liable for benefits pursuant to AS 23.30.075(b) and AS 23.30.255.” (Claims and Amended Claims, September 8, 2022.)

30) On September 8, 2022, Employee filed his first medical summary, which contains 1,735 Providence Alaska Medical Center records from September 29, 2020 to November 9, 2020 and November 16, 2020. It also contains 12 pages of records from Ophthalmic Associates, Alaska Oncology, Anchorage Psychiatry, and Providence Medical Group. (Medical Summary, September 8, 2022.)

31) On September 14, 2022, all claims were properly served upon all parties via certified mail, return receipt requested. Employer’s return receipt was not received. (ICERS Event Details, Claim Served, September 14, 2022.)

32) On October 27, 2022, discovery was still being gathered and filed. Mr. Dennis advised, once discovery was complete, a hearing would be requested to determine compensability. The prehearing conference summary was served on Gina Moletti at Employer’s address of record, 130 West International Road, Suite E, Anchorage, Alaska 99518. (Prehearing Conference Summary, October 27, 2022.)

33) On November 9, 2022, Mr. Henry contacted the division to update Employer information. He requested a copy of the October 27, 2022 prehearing conference summary. He was advised to submit an entry of appearance and the appropriate form was sent to him. (ICERS, Event Details, Communication, Phone Call and Email, November 9, 2022.)

34) On January 9, 2023, the Fund denied Employee’s claims in its answer and controversion. (Fund Answer, January 9, 2023; Controversion, January 9, 2023.)

35) On February 9, 2023, Employee requested a hearing be scheduled on all claims served on September 14, 2022. (Affidavit of Readiness for Hearing, February 9, 2023.)

36) On February 9, 2023, Employee filed his second medical summary, which contained 15 pages of medical records from 2018 and 2019. (Medical summary, February 9, 2023.)

- 37) On February 17, 2023, the Fund opposed Employee's hearing request because all necessary discovery had not been completed. (Affidavit of Opposition, McKenna Wentworth, February 17, 2023.)
- 38) On March 15, 2023, the Fund objected to setting a hearing and advised medical records had not yet been received from multiple providers. The designee scheduled a May 25, 2023 hearing over the Fund's objection. (Prehearing Conference Summary, March 15, 2023.)
- 39) On March 15, 2023, hearing notice was served by certified mail. Employer's notice was addressed to its non-attorney representative, Gina Moletti, and sent to Employer's address of record. The certified mail return receipt was signed by Heath (indecipherable last name), building manager for Employer's office building. (ICERS Event Details, Hearing Notice Served, March 15, 2023; Certified Mail Return Receipt, Article Number 7022 3330 0002 1204 7152, March 20, 2023; Henry.)
- 40) On March 16, 2023, the March 15, 2023 prehearing conference summary containing notice of the May 25, 2023 hearing, was mailed to Augustine Enterprises, LLC, at Employer's address of record. (ICERS Event Details, Prehearing Conference Summary Served, March 16, 2023.)
- 41) On April 18, 2023, Lee Henry entered his appearance on Employer's behalf. (Entry of Appear April 18, 2023.)
- 42) On May 5, 2023, Employer requested the May 25, 2023 hearing be continued. It contended it was not notified of prehearing conferences in October 2022 or March 2023, and as a result was not able to present a defense or any rebuttal to Employee's claims. (Petition, May 5, 2023.)
- 43) On May 8, 2023, Employee opposed a continuance. He contended Employer's assertion it was not notified of the October 2022 and March 2023 prehearing conferences is refuted by certificates of service all prehearing notices were served upon Gina Moletti or Augustine Enterprises at Employer's address of record. Employee contends Employer simply ignored the prehearing conference notices and summaries and has failed to show good cause for continuing the hearing. (Opposition to Employer's Petition to Continue Hearing, May 8, 2023.)
- 44) On May 18, 2023, Employee filed a medical summary with a March 20, 2020 record from Dr. Bales. (Medical Summary, May 18, 2023.)
- 45) On May 25, 2023, at hearing, the parties stipulated Employee was employed by Employer on September 12, 2020 and September 20, 2020. That also stipulated that admission does not preclude Employer or the Fund from asserting Employee was not acting in the course or scope of

his employment on September 12 or 20, 2020, the dates he reported his injuries occurred. (Oral Stipulation, May 5, 2023.)

46) Mr. Henry contended good cause exists to continue the hearing for several reasons. First, because Employer did not get notice of prehearings, the hearing, or copies of prehearing conference summaries. He said Gina Moletti is no longer Employer's employee and mail addressed to her would not make its way to Employer's office because those who handle the mail do not do so properly. Mr. Henry said it is his signature on the entry of appearance authorizing non-attorney representative Ms. Moletti to represent Employer, but he did not remember signing it or having it served and filed. He does not believe Ms. Moletti was qualified to serve as a "legal" representative. He said despite his signature on the entry of appearance, Ms. Moletti did not agree to serve as Employer's representative. Second, Mr. Henry said he only found out about the hearing when Elliott Dennis called him in mid-May to schedule his deposition before the May 25, 2023 hearing. He contends good cause exists because he has not yet obtained an attorney to represent Employer. Mr. Henry said Daryl Thompson attended a prehearing and was supposed to enter his appearance but did not. He attempted to get in touch with Mr. Thompson to represent Employer at hearing, but Mr. Thompson was not available. His paralegal told Mr. Henry that Mr. Thompson is not taking on new clients but since Employer was an established client, she would check and get back to him. He had not heard back from Mr. Thompson's office. Third, Mr. Henry contends his failure to get notice, an attorney, and to gather witnesses is "excusable neglect" and if the hearing is not continued irreparable harm may result. Mr. Henry referenced 8 AAC 45.074. He said he wants an opportunity to be heard in a way that protects Employer. (Henry.)

47) Employee contended good cause does not exist to continue the hearing. He said Mr. Henry is a businessman and knows the importance of workers' compensation insurance and of having an address where business mail can be received. He pointed out Employer was served via email with the Fund's opposition to his hearing request in January 2023, which should have given sufficient notice "something was going on and he needed to make an inquiry somewhere." Employee contends Mr. Henry has a history delaying court proceedings by saying he needs an attorney. Employee believes that is what is happening in the instant matter. He contends his is a medically complex case and it is not fair to delay further. (Record.)

48) Employer's mailing address is 130 West International Road, Suite E, Anchorage, Alaska, 99518. (Henry.)

49) In response to the panel’s questions, McKenna Wentworth testified the Fund objected to the hearing being scheduled because this is a medically complex case and requires a great deal of medical discovery and investigation to determine compensability. The Fund scheduled an independent medical evaluation and Employee was unable to attend because he was ill. The Fund did not have an opportunity to reschedule the medical evaluation because the hearing was scheduled, it had not yet received all the medical records, and there was not sufficient time. The records it received also need to be supplemented. It did not want to reschedule the independent medical evaluation until all Employee’s records were collected. When it does, the evaluation will be rescheduled. Discovery is just now coming in and the Fund continues to gather medical records. It recently received over 2,000 pages and awaits medical records from additional providers. On May 19, 2023, the Fund sent Employee “new updated” medical releases based upon medical summaries filed on May 18, 2023. The releases are for records from December 11, 2013 to the present for Employee’s head, bilateral shoulders, arms, wrists, hands, bilateral legs and calves. Releases have also been sent for psychiatric, alcohol and drug records. The Fund estimates it will take six months to obtain all relevant records and complete an independent medical evaluation. (Wentworth.)

50) Ms. Wentworth’s testimony is credible. (Judgment.)

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. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .

(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 . . . all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State of Alaska*, 620 P.2d 182, 192 (Alaska 1980). In *Fred Meyer, Inc. v. Kristine Updike*, AWCAC Decision No. 120 (October 29, 2009), the Commission ruled the board erred when it failed to review the complete record and rendered a decision on an incomplete record. The Commission identified records missing from the board's record and despite the board's representation its determination was based upon the complete record before it when the case was heard, the commission concluded the record was incomplete. The Commission chided the board for failing to notify the parties the record was incomplete and concluded ". . . the board's failures are manifest or plain errors because they are 'obvious mistakes' that create 'a high likelihood that an injustice has resulted'" and the matter must be remanded for further evaluation. *Id.* at 11.

Smith v. CSK Auto, Inc., 204 P.3d 1001, 1012-13 (Alaska 2009) held where the board renders its decisions on an incomplete record, it commits plain error. *Smith* addressed a settlement agreement's approval without a complete medical record. The Court was "troubled by the Board's ready approval of the agreement in the absence of testimony from Smith, particularly in light of the fact that the Board had incomplete medical records before it when it approved the agreement." *Id.* at 1012. *Smith* acknowledged failure to submit complete medical records might not always be reversible error, but "here it underscores the Board's lack of a complete record before approval of the agreement, when the agreement was presumed not to be in Smith's interest." *Id.* at 1012-1013. *Smith* found the board abused its discretion.

Burgess Construction Co. v. Smallwood, 623 P.2d 312, 316, (Alaska 1981), noted:

In *Fireman's Fund American Insurance Cos. v. Gomes*, 544 P.2d 1013, 1016 (Alaska 1976), we recognized two means by which the presumption could be overcome: (1) affirmative evidence that the injury is not work-related, and (2) elimination of all reasonable possibilities that the injury was work-related. Thus, in order to produce substantial evidence necessary to overcome the presumption, it is imperative that the carrier be given an opportunity to cross-examine the

claimant's medical experts and produce its own medical evidence of lack of aggravation or causation.

AS 23.30.010. Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

....

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

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.

AS 23.30.155. Payment of compensation. . . .

....

(h) The board may upon its own initiative at any time in a case in which . . . right to compensation is controverted . . . make the investigations . . . and take the further action which it considers will properly protect the rights of all parties.

8 AAC 45.052. Medical summary. (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or

may be relevant to the claim of petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.

(b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

....

(d) After a claim or petition is filed, all parties must file with the board an updated medical summary form within five days after getting an additional medical report. A copy of the medical summary form, together with copies of the medical reports listed on the form, must be served upon all parties at the time the medical summary is filed with the board.

(e) No hearing will be scheduled or held until the party filing the affidavit of readiness for hearing has complied with the provisions of this section.

8 AAC 45.054. Discovery.

....

(d) a party refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

8 AAC 45.060. Service.

....

(b) Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address

8 AAC 45.074. Continuances and cancellations. . . .

....

(b) Continuances . . . are not favored by the board and will not be routinely granted. A hearing may be continued . . . only for good cause and in accordance

with this section. For purposes of this subsection,

(1) good cause exists only when

....

(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;

....

(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

Was the oral order continuing the hearing correct?

The legislative goal is that the Act be interpreted to ensure, among other things, "fair" delivery of workers' compensation benefits to injured workers at a reasonable cost to employers if the worker is entitled to benefits. AS 23.30.001(1). Cases should be decided on their merits, hearings must be fair to all parties, and all parties must be afforded due process and an opportunity for their arguments and evidence to be fairly considered. AS 23.30.001(2) and (4). Claims may be investigated, and hearings or inquiries conducted in a manner by which all parties' rights may be best be ascertained. AS 23.30.135(a). Action may be taken in decisions and orders to properly protect all parties' rights. AS 23.30.155(h). Hearing continuances are not favored and not routinely granted; there must be "good cause" to continue a hearing. 8 AAC 45.074(b) "Good cause" includes when in response to the panel's inquiry it is determined additional evidence is necessary to complete the hearing. 8 AAC 45.074(b)(1)(L).

Employer requested a continuance and asserted several arguments to support its request. First, it contended it had not been properly served with prehearing conference summaries or prehearing and hearing notices. Because its non-attorney representative is no longer employed by Employer, it claims mail addressed to Gina Moletti at its address of record was never received. Mr. Henry said the building in which its office is located provides an unreliable mail delivery service to its tenants. Employer requests it be found that despite its due diligence, irreparable harm will result if a continuance is not granted. Employer was properly served with prehearing conference

summaries, prehearing notices, and hearing notice at its place of business, which is its address of record. 8 AAC 45.060(b).

Employer did not want to proceed to hearing without attorney representation and again contended its failure to secure representation was excusable neglect. Mr. Henry said he attempted to contact Mr. Thompson to enter an appearance as soon as he learned a hearing had been scheduled. Mr. Thompson attended a prehearing on May 6, 2021 and said he would enter his appearance “shortly.” Although, he never did. Neither Employer nor Mr. Thompson exercised diligence to assure his entry of appearance was filed, and Employer had attorney representation. The hearing was scheduled over a year after Mr. Thompson said he would enter an appearance. Mr. Henry’s attempts to secure representation from Mr. Thompson came too late in the process to be considered excusable or Mr. Thompson’s unavailability a surprise and do not serve as “good cause” to continue the hearing. 8 AAC 45.074(b)(1)(L) and (N).

Employee requested a hearing to determine his claim’s compensability and the issue set for hearing was whether Employee’s injury arose out of and in the course of his employment. Employee’s four claims all seek TTD, PTD, PPI, and AS 23.30.041(k) benefits, medical and transportation costs, a compensation rate adjustment, penalty, interest, a frivolous and unfair controversion finding, and attorney fees and costs. Two claims seek benefits for injuries to his legs, arms, wrists, shoulders, back, neck and spine. His other two claims seek benefits for DVT, an adverse reaction to anesthesia resulting in paralysis and right eye blindness, and conversion disorder. Employee had extensive medical history prior to reporting his work injuries. His is a complex medical case; it is not limited to aggravation of pre-existing carpal tunnel syndrome and DVT.

Despite filing a claim on October 23, 2020, and reports of injury in October and November 2020, he did not file medical summaries. 8 AAC 45.052. Employee admitted he did not want to comply with discovery requests or file any evidence until hearing deadlines were given. He was routinely advised he was required to exchange information with Employer and the Fund. Notwithstanding that advice, Employee said it was his intent to wait until “the last minute” so Employer and the Fund would not have an opportunity to rebut his evidence. It was not until Employee was represented that he filed his first medical summary on September 8, 2022, which contains 1,735

pages of medical records from Providence Alaska Medical Center and a total of 12 pages from four other providers. Medical records often reveal injured workers have pre-existing conditions, which may or may not be considered factors contributing to an employee's disability or need for medical treatment. *Rogers & Babler*. To decide whether Employee's injury arose out of and in the course of his employment, he must establish a preliminary link between his employment and his disability and need for medical treatment. AS 23.30.010(a). The relative contribution of each different cause of his disability and need for medical treatment must be analyzed to decide which is the substantial factor. *Id.* Attorneys, adjusters, employers, and the Fund review medical records and decide if further discovery is needed before proceeding to hearing. *Rogers & Babler*. Employee has extensive pre-existing conditions, and the panel must consider their relative contribution to Employee's disability and need for medical treatment; however, Ms. Wentworth responded to the panel's inquiries that the record has not been fully developed. Her testimony is supported by a review of records from Providence Alaska Medical Center and Dr. Wright. AS 23.20.122. If sufficient time is not permitted to gather, review, and file medical records and other evidence prior to a hearing, parties' due process rights may be violated. AS 23.30.001(4); *Matanuska Maid; Burgess; Updike; Smith*.

Ms. Wentworth said an EME was scheduled and due to illness, Employee was unable to attend. Thereafter, there was not sufficient time to schedule another EME prior to hearing. The Fund is actively collecting relevant medical records and will wait to reschedule the EME appointment until it completes discovery so a complete medical record can be provided to the EME physician. The Fund recently received over 2,000 pages of medical records and awaits more from additional providers. It provided updated releases to Employee after receiving his May 18, 2023 medical summary.

When Employee did not file medical summaries when he filed his initial claim on October 23, 2020, or when Employer requested discovery on January 29, 2021. He did not heed the advice to provide medical records to Employer and the Fund, which was given at each prehearing and each time he spoke to a workers' compensation officer to complain his case was not moving forward. Complex medical cases involving work injuries combined with pre-existing conditions often involve voluminous medical records and discovery would have moved forward at a much quicker,

more efficient pace had Employee cooperated and complied with 8 AAC 45.052. *Rogers & Babler*.

It is not fair, efficient, predictable, or at a reasonable cost to Employer or the Fund to determine compensability prior to obtaining a complete record. *Burgess*. The record would have to remain open to permit the Fund to move forward with an EME after obtaining all relevant medical records. To prevent faded memories, panel members' unavailability for subsequent hearings, and to assure continuity and a complete record, the panel can best ascertain the parties' rights, afford due process, and assure each party an opportunity to be heard and for their arguments and evidence to be fairly considered, by taking all evidence regarding compensability at one hearing. AS 23.30.135. It was proper to continue the hearing. AS 23.30.001(4); AS 23.20.135(a); AS 23.30.155(h); 8 AAC 45.074(b)(1)(L).

CONCLUSIONS OF LAW

1) The oral order to continue the hearing was correct.

ORDER

- 1) Employer's petition to dismiss is denied.
- 2) The May 25, 2023 hearing is continued in accordance with this decision.
- 3) Employee is directed to file all medical records which are or may be relevant to his injuries on a medical summary and serve a copy on all parties.
- 4) The Fund is directed to file all medical records is collected which are or may be relevant to Employees injuries on a medical summary and serve a copy on all parties.
- 5) The parties are directed to attend a prehearing conference on June 12, 2023, at 10:00 a.m.

