

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

LENISHA M. MILOW, )  
)  
Employee, ) INTERLOCUTORY  
Claimant, ) DECISION AND ORDER  
)  
v. ) AWCB Case No. 202204881  
)  
STATE OF ALASKA, ) AWCB Decision No. 23-0049  
)  
Self-Insured Employer, ) Filed with AWCB Anchorage, Alaska  
Defendant. ) on September 8, 2023.  
)  
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Lenisha Milow's (Employee) March 30, 2023 petition for review of Reemployment Benefits Administrator Designee's (RBAD) decision was scheduled to be heard in Anchorage, Alaska on September 6, 2023, a date selected on July 21, 2023. Employee's March 30, 2023 hearing request gave rise to this hearing. Attorney John Brainerd appeared and represented Employee. Attorney Justin Tapp appeared and represented the State of Alaska (Employer). Employee's oral request for a continuance was heard as a preliminary matter, and the hearing was continued. This decision memorializes the oral order. No witnesses testified. The record closed at the hearing's conclusion on September 6, 2023.

## ISSUE

Employee's attorney contends the hearing should be continued because his client is unavailable and Employee is seeking additional medical opinions that she cannot currently procure while out of State. Employer did not object to continuing the hearing.

**1) Was the oral order continuing the September 6, 2023 hearing correct?**

FINDINGS OF FACT

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

1) On March 14, 2022, Employee reported she was injured when she slipped on ice and fell face first onto the ground while attempting to get in her car. She reported she injured her cervical vertebrae, teeth, collarbone, right shoulder, and abdomen area. Employee was working as a Corrections Officer for the State of Alaska at the McLaughlin Youth Facility in Anchorage, Alaska. (First Report of Injury, March 28, 2022).

2) On August 25, 2022, the Reemployment Benefits Technician informed Employee that because she missed 90 consecutive days from work due to her injury a rehabilitation specialist had been assigned to perform a reemployment benefits eligibility evaluation. Employee's specialist was Forooz Sakata. (Referral Letter, August 25, 2022).

3) On November 8, 2022, Sakata determined Employee was eligible for reemployment benefits based on Brian Miller, M.D.'s predictions she would have a permanent partial impairment (PPI) and will have permanent physical capabilities less than the physical demands of any job she held in the last ten years when medically stable. (Re-employment Benefits Eligibility Evaluation, November 8, 2022).

4) On January 11, 2023, RBAD Penny Helgeson, notified Sakata she was suspending a decision on Employee's reemployment benefits eligibility because Employee received a college degree in Criminal Justice in 2014. Sakata's evaluation did not consider this degree. Moreover, a March 15, 2022 medical report noted Employee worked at the Alaska Club. Sakata did not identify this job title or submitted to Employee's physician. Further, Dr. Miller's report of a predicted PPI rating was not included in Sakata's report. The RBAD gave Sakata until March 1, 2023 to re-file her evaluation with the requested information so a determination could be made. (Eligibility Evaluation Determination Suspension Letter, January 11, 2023).

5) On March 1, 2023, Sakata supplied an updated eligibility evaluation. She included Employee's educational background, and additional employment with the Alaska Club. Sakata noted in her report Employee was comfortable with having Jared Kirkham, M.D., manage her workers' compensation paperwork relating to her March 14, 2022 injury. In her evaluation Sakata found Employee not eligible for re-employment benefits. Sakata noted Dr. Kirkham predicted Employee would not have a PPI rating greater than zero, and she would have the permanent physical

capacities to perform the physical demands of her job at the time of injury. (Re-employment Benefits Eligibility Evaluation, March 1, 2023).

6) On March 16, 2023, RBAD Helgeson found Employee ineligible for reemployment benefits. She referred to Sakata's March 1, 2023 evaluation, noting Dr. Kirkham predicted Employee would have the physical capacities to perform her job as a Corrections Officer. Dr. Kirkham also predicted Employee would not have a PPI rating greater than zero and under AS 23.30.041(f)(4), "An employee is not eligible for reemployment benefits if at the time of medical stability, no permanent impairment is identified or expected." The RBAD's letter advised Employee she must file a petition within ten days of the determination if she wished to seek review. (Eligibility Evaluation Determination Letter, March 16, 2023).

7) On March 30, 2023, Employee filed a petition for review of the RBAD's determination and a request for extension of time to request a hearing. Employee noted she did not receive the benefits determination letter until two days after the deadline to request a hearing due to a change in address. Employee received the letter on March 28, 2023, and forwarded it to her attorney the same day. Employee's attorney in her request for review contends there were outstanding medical records not considered by the reemployment specialist and the RBAD in her determination. Employee filed her affidavit of readiness for hearing with her petition. (Petition, Reason for Petition, Affidavit of Readiness for Hearing, Release of Medical Information, March 30, 2023).

8) On April 14, 2023, Employer opposed Employee's hearing request. Employer contended it did not have adequate time to prepare and identify relevant witnesses and discovery that may still be outstanding. (Opposition to Employee's Affidavit of Readiness, April 14, 2023).

9) On May 2, 2023, the parties agreed to a July 13, 2023 hearing. Employee's petition for review was the sole hearing issue identified. (Prehearing Conference Summary, May 2, 2023).

10) On July 7, 2023, Employer filed its hearing brief. (Hearing Brief, July 7, 2023).

11) On July 12, 2023, the parties submitted a stipulation to continue the July 13, 2023 hearing for at least one month due to an unexpected illness of Employee's attorney. (Stipulation to Continue Hearing, July 12, 2023).

12) On July 21, 2023, the parties requested a September 6, 2023 hearing. (Communications tab, Email, Agency file, July 21, 2023).

13) On September 6, 2023, Employee was out of state completing an internship in Virginia. She is expected to return to Alaska in October. Employee requested the hearing be continued to allow

her to testify. Employee contended that because she has been in Virginia she has been unable to secure a PPI rating or any additional medical reports that may aid in her reemployment benefits eligibility evaluation. A continuance was requested to allow Employee the opportunity to obtain a PPI rating. (Employee’s Hearing Argument, September 6, 2023).

14) At hearing Employer noted that Employee’s attorney had reached out prior to hearing and the parties agreed to the continuance. Employer did not object to a continuance. (Employer’s Hearing Argument, September 6, 2023).

PRINCIPLES OF LAW

**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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter .

...

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 23.30.130. Modification of awards.** (a) Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

...

In the case of a factual mistake or a change in conditions, a party “may ask the board to exercise its discretion to modify the award at any time until one year” after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743

(Alaska 2005). Although the board has authority to modify an earlier factual finding, it must give the parties proper notice of its intent to do so. *Dresser Industries, Inc. v. Hielstand*, 702 P.2d 244 (Alaska 1985).

**AS 23.30.135. Procedure before the board.**

(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties.

**8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

**8 AAC 45.074. Continuances and cancellations.**

....

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

....

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

....

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancellation under this section

ANALYSIS

Hearings will be held at the time and place fixed by notice served and a continuance may only be granted in accordance with the Act. 8 AAC 45.070(a). Continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). "Good cause" is required to grant a continuance and the applicable regulation provides situations that constitute good cause. 8 AAC 45.074(b)(1). One of the possible showings of good cause in 8 AAC 45.074(b)(1) must apply. Under (A), a material

witness is unavailable on the scheduled date and deposing the witness is not feasible. Under (N), a continuance can be granted when irreparable harm may result despite a party's due diligence. Employee requested a hearing but was unavailable due to internship training obligations. She requested the hearing be continued and Employer did not object based on Employee's unavailability. If Employee is unavailable to testify regarding the RBA's determination, she is not eligible for benefits, it is likely irreparable harm may occur. The hearing was properly continued to allow Employee to testify on her behalf at a later date.

Employee is reminded that under AS 23.30.130, she has one year to request modification of the RBA's determination she is not eligible for reemployment benefits if a "change in conditions" occurs since the date of the determination. *Lindekugel*. A "change in conditions" could include a PPI rating greater than 0%.

CONCLUSIONS OF LAW

1) The oral order continuing the September 6, 2023 hearing was correct.

ORDER

- 1) Employee's September 6, 2023 request for continuance is granted.
- 2) Employee's April 7, 2023 affidavit of readiness for hearing remains effective and will be held in abeyance.
- 3) Jurisdiction is reserved to resolve any remaining disputes.

Dated in Anchorage, Alaska on September 8, 2023.

ALASKA WORKERS' COMPENSATION BOARD

\_\_\_\_\_  
/s/  
Kyle D Reding, Designated Chair

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/s/  
Sara Faulkner, Member

\_\_\_\_\_  
/s/  
Bronson Frye, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after 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 LENISHA M MILOW, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 202204881; 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 September 8, 2023.

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/s/  
Rachel Story, Office Assistant I