

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MANUEL HERNANDEZ,)	
)	
Employee,)	
Claimant,)	INTERLOCUTORY
)	DECISION AND ORDER
v.)	ON RECONSIDERATION
)	
OCEAN BEAUTY SEAFOODS, LLC,)	AWCB Case No. 201711427
)	
Employer,)	AWCB Decision No. 24-0023
and)	
)	Filed with AWCB Anchorage, Alaska
LIBERTY INSURANCE CORPORATION,)	on April 18, 2024
)	
Insurer,)	
Defendants.)	
)	

Manuel Hernandez's (Employee) April 16, 2024 petition seeking reconsideration was heard on the written record on April 17, 2024, in Anchorage, Alaska, a date selected on April 16, 2024. The April 16, 2024 petition gave rise to this hearing. Employee represents himself; Attorney Krista Schwarting represents Ocean Beauty Seafoods, LLC and its insurer (Employer). The record closed at the hearing's conclusion on April 17, 2024.

ISSUE

Employee contends the Workers' Compensation Division (Division) scheduled and held a prehearing conference on February 21, 2024, without giving him notice and a fair opportunity to participate. He also contends the Alaska Workers' Compensation Board still has jurisdiction in this case and must reconsider his November 7, 2023 claim and all related evidence.

Employer's time to answer the petition has not yet expired. This decision presumes Employer opposes the petition.

Is there authority to reconsider any issue in Employee's case?

FINDINGS OF FACT

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

- 1) On January 29, 2024, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 24-0002 (January 29, 2024) (*Hernandez VIII*) among other things, granted Employer's request for more time to complete discovery given Employee's presentation of new medical records. *Hernandez VIII* gave Employer six months to complete its discovery, and scheduled a July 31, 2024 prehearing conference so the parties could schedule a hearing pursuant to a remand from the Alaska Workers' Compensation Appeals Commission (Commission). (*Hernandez VIII*).
- 2) On January 30, 2024, Employee petitioned for reconsideration of *Hernandez VIII*, citing his displeasure that it gave Employer six months to complete its discovery before a merits hearing on remand could occur. (Petition, January 30, 2024).
- 3) On January 31, 2024, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCB Dec. No. 24-0002 (January 29, 2024) (*Hernandez IX*) denied Employee's petition to reconsider *Hernandez VIII*. *Hernandez IX* explained to Employee in detail why it was necessary to grant Employer additional time to complete discovery. (*Hernandez IX*).
- 4) On February 4, 2024, Employee sought review from the Commission. (Sua Sponte Order Converting Appeal to Petition for Review, February 5, 2024).
- 5) On February 5, 2024, the Division sent Employee at his address of record, **** E. 6th Ave., Space #**, Anchorage, AK 99504 (address redacted for privacy), a notice stating that a prehearing conference was scheduled in his case for February 21, 2024, at 9:00 AM Alaska time. The notice stated, "**the board designee will phone each party at their phone number on record**" (emphasis in original). (Prehearing Notice, February 5, 2024).
- 6) Employee's agency file does not show that the United States Postal Service (USPS) returned the February 5, 2024 prehearing conference notice to the Division. (Agency file).
- 7) The Division gave Employee more than 10 days' written notice of the February 21, 2024 prehearing conference. (Prehearing Notice, February 5, 2024).

8) On February 21, 2024, Board designee Harvey Pullen conducted a prehearing conference as scheduled at 9:00 AM Alaska time and reported:

A representative for the Employee did not attend this prehearing conference. Designee was able to leave a voicemail message (907) ***-**** [number redacted for privacy]. Designee notes that the [Board's] jurisdiction is suspended while this case is on Appeal with the [Commission].

Consequently, the designee took no action other than to advise the parties that the Board's jurisdiction was suspended while awaiting the Commission's decision on pending petitions for review. Specifically, the designee did not enter any discovery orders at this prehearing conference. (Prehearing Conference Summary, February 21, 2024).

9) On February 21, 2024, at approximately 9:46 AM, Employee called and spoke with a Workers' Compensation Technician who summarized, in his agency file, her conversation with him:

EE [Employee] called to state he accidentally slept through the PHC [prehearing conference] that was scheduled for this morning. I told him the summary is not available yet to see what was discussed but he can wait a few days for the summary to come out. I explained that often if both parties are not present they will just schedule a new PHC and to look for this on the summary when he receives it. (Agency file: Judicial, Communications, Phone Call tabs, February 21, 2024).

10) On February 21, 2024, the Division served the subject prehearing conference summary on Employee by mail at his address of record. (Prehearing Conference Summary, February 21, 2024).

11) On March 27, 2024, *Hernandez v. Ocean Beauty Seafoods, LLC*, AWCAC Order on Petition for Review and Cross-Petition for Review (March 27, 2024) (*Hernandez X*) said:

The Commission finds that the Board properly protected [Employer's] due process rights through a time-honored judicial practice of permitting additional time to review and analyze materials when new materials come into evidence. The Alaska Supreme Court has noted on more than one occasion that due process rights are violated when a party is not permitted adequate time to prepare to be heard on an issue (citation omitted). Therefore, the Board properly allowed [Employer] additional time to review and analyze the additional medical records.

....

The Commission understands Mr. Hernandez's frustrations with the status of his claim, but the issues are complicated, and he is best served by allowing the process set forth by the Board to continue to a full hearing on the merits.

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For the reasons stated above, the Petition for Review filed by Mr. Hernandez . . . [is] DENIED. (*Hernandez X*).

12) On April 12, 2024, Employee wrote to the Board and Commission to express his opinion regarding “injustices” to which he was allegedly subjected. He contended the Board exhibited favoritism toward Schwarting and treated him unfairly. Referring to his November 7, 2023 claim, Employee stated, among other things:

[T]he AWCB schedule[d] [prehearing] same day same time and the injured worker had no opportunity to call or be present [;] it is clear that AWCB has favoritism and [partiality] in this case. See attached voicemail evidence.

Employee asked the Commission to review the above paragraph and “make a decision because AWCB is unfair.” Attached to Employee’s letter was a transcript from a voicemail message:

Hello, this message is for Manuel Hernandez. My name is Harvey [Pullen]. I’m with the workers compensation board at Anchorage Alaska. I was calling in regards to a prehearing conference scheduled for 9 a.m. [t]oday 21st February [in] your workers comp case. If you get this message in the next few minutes, you can give us a call back here at 907-269-4980. Thank you.

Also attached was a copy of Employee’s November 7, 2023 claim. (Letter, April 12, 2024).

13) On April 15, 2024, the Commission’s clerk wrote Employee and advised that when the Commission denied his petition for review on March 27, 2024, jurisdiction returned to the Board. The clerk highlighted a portion from the Commission’s order which stated, “The effect of this order is to allow the Board to proceed toward a hearing on the merits of the employee’s workers’ compensation claim. The petitioner may still appeal a final Board decision when it is reached on the claim.” The clerk’s letter also noted that the Commission’s order instructed him how to file a motion with the Commission to reconsider its order denying his Petition for Review, or petition the Alaska Supreme Court to review the Commission’s order. “Neither of those steps were taken by you.” The letter stated the Board has jurisdiction over his case and the Commission was not currently involved. The clerk reminded Employee he could still appeal or petition for review any future Board decision. (Letter, April 15, 2024).

14) On April 16, 2024, Employee filed a petition with the Division seeking “Reconsideration” and stating:

On February 21, 2024 the AWCB Scheduled [prehearing] same day same time, was not fair to the injured Employee. The injured employee [sic] He could not participate in that [prehearing] due to lack of time, it was not fair to the injured [sic]. AWCB still has jurisdiction in this case and must reconsider the claim submitted and all evidence. [S]ee next pages.

Attached to Employee's April 16, 2024 petition was the September 21, 2024 transcribed telephone message from Pullen to Employee as set forth in factual finding 12, above. Employee also attached his November 7, 2023 claim. (Petition, April 16, 2024).

PRINCIPLES OF LAW

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 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case. . . . 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. . . .

8 AAC 45.060. Service. . . .

(b) . . . If a right may be exercised or an act is to be done, three days must be added to the prescribed period when a document is served by mail.

. . . .

(e) Upon its own motion or after receipt of an affidavit of readiness for hearing, the board will serve notice of time and place of hearing upon all parties at least 10 days before the date of the hearing unless a shorter time is agreed to by all parties or written notice is waived by the parties.

8 AAC 45.063. Computation of time. (a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

(b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

8 AAC 45.065. Prehearings. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

. . . .

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition in accordance with 8 AAC 45.050 that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

(i) Notwithstanding the provisions of (d) of this section, a board designee may order reconsideration of all or part of a discovery order entered by the board designee under AS 23.30.108 on the board designee's own motion or on petition of a party. To be considered by the board designee, a petition for reconsideration must set out the specific grounds for reconsideration and be filed with the board in accordance with 8 AAC 45.050 no later than 10 days after service of a board designee's discovery order. The power to order reconsideration expires 20 days after service of a board designee's discovery order. If no action is taken on a petition during the time allowed for ordering reconsideration, the petition is considered denied. If a petition for reconsideration is timely filed with the board, a petition for appeal under (h) of this section must be filed no later than 10 days after service of the reconsideration decision or the date the petition for reconsideration is considered denied in the absence of any action on the petition, whichever is earlier.

ANALYSIS

Is there authority to reconsider any issue in Employee's case?

Employee's April 16, 2024 Petition for reconsideration implies that he wants the prehearing designee to reconsider or otherwise change his February 21, 2024 prehearing conference summary. 8 AAC 45.065(c). Or he wants this panel to "reconsider" his pending claim and hold an immediate hearing. His exact intent is unclear. What is clear is that the Division, on February 5, 2024, properly served notice on Employee advising him of the February 21, 2024 prehearing conference. 8 AAC 45.060(b). The USPS has not returned that notice to the Division. Employee had more than 10-days' notice of the prehearing conference. 8 AAC 45.060(e). As he stated he would on the prehearing conference notice, the designee called Employee exactly at the appointed hour, on the proper date, and he did not answer the phone. The designee's message suggested that Employee return the call within the next few minutes. He did not call the Division until well after the brief prehearing conference had concluded.

On February 21, 2024, the Division properly served the subject prehearing conference summary on Employee by mail at his record address. 8 AAC 45.060(b). The USPS has not returned that summary to the Division. As stated on the summary, if Employee wanted the designee to modify the summary, amend a factual misstatement, or change a determination stated in that summary, he had until March 7, 2024, to make a written request (10 days after February 21, 2024 = March 2, 2024 (a Saturday) + two days (because March 2, 2024 was a Saturday) = March 4, 2024 + three days (for service by mail) = March 7, 2024). 8 AAC 45.060(b); 8 AAC 45.063(a); 8 AAC 45.065(d). Since the designee did not make a "discovery order" on February 21, 2024, Employee had no right to "appeal" and no right to "reconsideration" of anything done at that prehearing conference under 8 AAC 45.065(h) or (i). Employee did not file his reconsideration petition until April 16, 2024, long after his deadline had expired. He offered no "good cause" to extend the deadline to change the prehearing conference summary. 8 AAC 45.063(b). Therefore, neither the prehearing designee nor this panel has authority to reconsider or review on appeal the February 21, 2024 prehearing conference summary, if that is what Employee is requesting.

Moreover, about 45 minutes after the prehearing conference began on February 21, 2024, Employee called the Division and admitted that “he accidentally slept through” the prehearing conference. His summarized discussion with a Division staff member, placed in his agency file, did not mention inadequate notice for the prehearing conference. Weeks later, Employee filed documents contending that he was not given a fair opportunity to participate in the February 21, 2024 prehearing conference. He implies that he had inadequate notice, but his petition said nothing about him sleeping through the conference. Perhaps Employee was not aware that Division staff summarize conversations they have with parties to a case, and note them in the worker’s agency file. In any event, Employee’s statement that he was not given a fair opportunity to participate in the prehearing conference is not credible. AS 23.30.122. Furthermore, since the designee took no action at the prehearing conference other than to say jurisdiction was suspended until the Commission ruled, there was nothing to change, as the designee’s statement was correct.

Alternately, if Employee seeks reconsideration of *Hernandez VIII* or *IX*, he is too late. Those decisions were issued on January 29, 2024, and January 31, 2024, respectively. Both contained explicit instructions and deadlines for requesting reconsideration. Employee filed no request for reconsideration of either decision, timely. The agency’s power to reconsider those decisions expired on February 28, 2024, and March 1, 2024, respectively. AS 44.62.540. As those dates are long past, the panel’s authority to reconsider either one is likewise long gone. Given this analysis, Employee’s April 16, 2024 petition for reconsideration will be denied.

CONCLUSION OF LAW

There is no authority to reconsider any issue in Employee’s case.

ORDER

Employee’s April 16, 2024 petition for reconsideration is denied.

Dated in Anchorage, Alaska on April 18, 2024.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/
William Soule, Designated Chair

_____/s/
Mark Sayampanathan, Member

_____/s/
Anthony Ladd, 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 on Reconsideration in the matter of Manuel Hernandez, employee / claimant v. Ocean Beauty Seafoods, LLC, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201711427; 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 April 18, 2024.

_____/s/
Pamela Hardy, Workers Compensation Technician