

Alaska Workers' Compensation Appeals Commission

Wasser & Winters Co., Inc. and Alaska
National Insurance Co.,

Appellants,

vs.

Scott E. Linke,
Appellee.

Memorandum Decision and Order

Decision No. 105 April 28, 2009

AWCAC Appeal No. 09-006

AWCB Decision No. 09-0014

AWCB Case No. 200507724

Motion to Stay Proceedings before the Alaska Workers' Compensation Board in AWCB Case No. 200507724, filed in an appeal from Alaska Workers' Compensation Board Decision No. 09-0014, issued January 22, 2009, by southcentral panel members Judith DeMarsh, Chair, David B. Robinson, Member for Labor, and Dave Kester, Member for Industry.¹

Appearances: Robert McLaughlin, Mann, Johnson, Wooster & McLaughlin, for movants, appellants Wasser & Winters Co., Inc. and Alaska National Insurance Co. Michael J. Patterson, Esq., for respondent, appellee Scott E. Linke.

Commission proceedings: Appeal filed February 2, 2009. Motion to Stay Proceedings Before the Board filed by appellants March 31, 2009. Opposition to Motion for Stay of Order for Hearing Before the Alaska Workers' Compensation Board on May 5, 2009, filed by appellee March 31, 2009. Hearing on Motion to Stay Proceedings held April 7, 2009. Order on Motion to Stay Proceedings issued April 10, 2009. Appellants' Motion to Dismiss Appeal filed April 15, 2009. Appeal dismissed April 24, 2009. Order on Motion to Stay Proceedings, originally issued April 10, 2009, re-issued as a memorandum decision and order with minor changes on April 28, 2009.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

¹ Board Member Kester participated, but was not available to sign the decision and order.

By: Kristin Knudsen, Chair.

Appellants, Wasser & Winters Co., Inc., and Alaska National Insurance Co., filed an appeal of Alaska Workers' Compensation Board Decision No. 09-0014, challenging the board's limitation on the employer medical examiner's ability to direct psychiatric testing in performing his examination. The board directed that the employer's medical examiner, Dr. Rapaport, may review all medical records, including testing that has already been done, and interview the employee.² However, based on the board-appointed medical expert's opinion that additional testing would be harmful to the employee,³ the board barred the employer's medical examiner from requiring diagnostic tests.⁴

Appellants petitioned the board for a continuance of the scheduled hearing.⁵ On March 17, 2009, the board's designee, Workers' Compensation Officer D. Simpson, denied the petition for a continuance on the basis that she lacked authority to cancel or continue the hearing under the board's regulation 8 Alaska Admin. Code 47.074, because there was no provision for continuance due to a conflict of jurisdiction when an appeal has been taken from a board decision.⁶ The designee directed that the petition

² *Scott E. Linke v. Wasser & Winters Co., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0014, 11-12 (Jan. 22, 2009) (DeMarsh, Chair).

³ *Id.* at 12. The board also relied on its decision in *MaryAnn Ammi v. State of Alaska, et al.*, Alaska Workers' Comp. Bd. Dec. No. 05-0303 (Feb. 17, 2005) (Pauli, Chair).

⁴ *Scott E. Linke*, Bd. Dec. No. 09-0014 at 14 (ordering that "employer's psychiatric EME shall be limited to a record review and an interview of the claimant, with no diagnostic testing to be conducted.").

⁵ The board heard the employee's claim on Dec. 20, 2007. The board did not close the record, but ordered an examination by its own psychiatric expert, Ronald Early, Ph.D., M.D. *Id.* at 3. After the hearing, but before Dr. Early's examination, certain records of the Washington Department of Labor and Industries were recovered. At a prehearing conference on October 28, 2008, the parties requested a hearing to determine a number of procedural issues, including the employer's request for a psychiatric employer medical examination. *Id.* at 5. No decision has been made on the compensability of the claim heard on Dec. 20, 2007.

⁶ Prehearing conference summary, D. Simpson, Appellants' Ex. 4, 3.

for a continuance would be heard as a preliminary matter to the scheduled board hearing on May 5, 2009.⁷ Appellants then filed a motion in this appeal on March 31, 2009, asking the commission to stay the board from hearing the claim on May 5, 2009.

Appellants argue that the outcome of this appeal is likely to affect the outcome of the board's decision. The additional evidence that could be developed by Dr. Rapaport, if he had the ability to order testing, will bear on the question of the nature of the employee's mental injury and its relationship to the employment. Appellants argue that any hearing that goes forward on the claim will conflict with the commission's jurisdiction over this appeal. Appellants urge the commission to enforce its jurisdiction and stay the board hearing. Appellants also argue that if the board goes forward with the hearing, and the commission resolves the appeal in their favor, the result will be a costly rehearing of the claim, which has already been delayed for 18 months.

Appellee concedes that the commission has the authority to stay the board's proceedings. However, appellee contends that a stay is not necessary in this case. Appellee argues the appeal was from a board decision that is interlocutory in nature, notwithstanding that the board called it a final decision.⁸ Therefore, appellee argues, the commission should consider the appeal as a motion for extraordinary review and, when viewed in this light, the appeal does not require a stay of board proceedings.⁹

⁷ Prehearing conference summary, D. Simpson, Appellants' Ex. 4, 3.

⁸ By titling its decision "final decision," the board forced the appellant to appeal within 30 days to preserve a right to appeal, rather than await a final decision on the merits of the claim.

⁹ In *Hope Comty. Res. v. Rodriguez*, the commission said, "[A] board order, whether termed "interlocutory" or "final" in the title, may require examination to determine whether it is truly final or interlocutory in effect. Whether or not a particular board order is a final, appealable order is a question of law" *Hope Comty. Res. v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041, 5 (May 16, 2007). The commission held that "[a]n appeal under AS 23.30.127 to the commission should be from a board decision that is final as to the appellant's rights, and leaves no further dispute on a pending claim or petition for the board to resolve." *Id.* at 7. Appellee did not file a motion to dismiss the appeal as improvidently taken, and did not concede that

Appellee also points to the extended delay in resolving this claim and argues that any further delay will harm his client.

At the hearing on this motion, the commission agreed to give the parties written notice of its decision and issue an order on the motion by Friday April 10, 2009.¹⁰ For the reasons discussed below, the commission denies the motion to stay the board's proceedings. However, the commission advises the board that it will, if the board requests, expedite its decision to minimize delay owing to a continuance required by sound considerations of economy.

DISCUSSION

The parties agree that the commission may, in order to preserve its appellate jurisdiction, stay a subsequent board proceeding in a case while a board decision is on appeal before the commission. The commission is the "exclusive and final authority for the hearing and determination of all questions of law and fact arising" in an appeal under the Alaska Workers' Compensation Act, except those questions appealed to the Alaska Supreme Court.¹¹ Therefore, once an appeal is filed in a workers' compensation case, the commission has exclusive jurisdiction over the issues raised on appeal.

In the appeal of Board Decision No. 09-0014, the issues raised are (1) whether the board's restrictions on use of the Washington records violates the Alaska Workers' Compensation Act and the employer's due process rights and (2) whether barring the employer medical examiner from diagnostic testing violates the Alaska Workers' Compensation statutes regarding employer medical examinations, the employer's due process rights, or the employer's right to present evidence.¹² According to the board's order, the issues for the scheduled board hearing are "limited to those issues delineated

appellants' right to appeal Bd. Dec. No. 09-0014 would be preserved in an appeal of a final board decision, so the commission considers that this argument is waived for purposes of this motion.

¹⁰ The commission gave notice that its April 10, 2009, Order may be published as a memorandum decision at a later date with changes in format and additional text, but without change in the substance of the commission's order.

¹¹ AS 23.30.008(a).

¹² Appellants' Notice of Points on Appeal (filed Feb. 2, 2009).

for the December 20, 2007 hearing," which are the employee's claims for the following benefits:

- 1) TTD from October 26, 2005 and continuing;
- 2) PPI;
- 3) medical costs;
- 4) transportation;
- 5) reemployment benefits;
- 6) compensation rate adjustment; and
- 7) attorney fees and costs.¹³

This statement of issues does not suggest that the board will reconsider the appealed decision or decide a legal issue that infringes upon the subject matter of the appeal. Nothing in the board's listing of issues suggests that it will revisit the facts that underlie its January 22, 2009, decision.¹⁴ Finally, because the board decided to limit the employer's medical examination over the employer's objection, the board may not give the employer medical examiner's opinion less weight on the grounds he did not have access to more recent diagnostic testing or did not conduct diagnostic testing.¹⁵

Although in oral argument on the motion to stay proceedings, appellants couched their request as one to enforce the commission's jurisdiction, the heart of their argument is that the parties face the possibility that, if the appeal is successful, the board will be required to rehear the claims because the omitted evidence might have altered the outcome.¹⁶ The commission agrees that is possible. Also, the board's decision, if favorable to appellants as to claims based on mental illness, may moot the appeal, leaving the employee to appeal the board's decision. Therefore, to the extent that the employee's claims (for temporary total disability compensation after

¹³ *Scott E. Linke*, Bd. Dec. No. 09-0014 at 13. The commission notes that these may be the claims asserted that will be decided by the board, but it is not an informative statement of the *legal issues* that will be presented at hearing.

¹⁴ The board's decision rested on a factual finding that further testing will be "intrusive" and, implicitly, harmful to the employee. Bd. Dec. No. 09-0014 at 12.

¹⁵ The board, having determined that new, repeated, or different diagnostic testing is not needed to form a sound expert psychiatric opinion, cannot later determine that an opinion lacking such a foundation is, for that reason, less sound or credible than an opinion that rests in part on diagnostic testing. The first determination is binding on the board as the law of the case.

¹⁶ The commission assumes appellants will make an offer of proof to the board to preserve the appeal point.

October 26, 2005, permanent partial disability compensation, medical benefits, and re-employment benefits), are based on the assertion that he is disabled by mental illness caused by the 2005 blow to his jaw, the possibility exists that a decision on the appeal presently before the commission may require the board to rehear those claims.

However, unless the board decision moots the appeal by denying the employee's claims based on mental illness, the board's decision will not affect the appellants' rights in this appeal.¹⁷ If the decision is adverse to the appellants, the appellants have the right to appeal an adverse decision on the same grounds and join it with this appeal. In that case, the commission may choose to reverse the board's decision, or vacate the board's decision and remand the case for rehearing if the appeal is upheld. In other words, the risk of reversal of a decision on the merits of the claim is borne by the appellee, but the risk of rehearing and its attendant costs is shared by appellants, appellee, and the board.

The board may choose to avoid these risks by continuing the hearing for sound reasons of adjudicative economy. However, the commission's authority to enforce its jurisdiction does not extend to staying board action to avoid waste of the board's and the parties' resources. Such considerations are for the board to weigh when it exercises its discretion on the petition to continue the hearing. The commission is amenable to expediting a decision, if the board so requests, to minimize delay owing to a continuance.¹⁸

¹⁷ A decision denying the claims against the appellants would deprive the appellants of a real stake in the outcome of the appeal, because there would be no liability that could be enforced against the appellants, or relief from liability granted them, as a result of the commission's decision on appeal. *Hope Comty. Res. v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 086, 10-11 (Aug. 8, 2008). A final decision on liability for mental injury would not be capable of repetition between the parties, so there would be no "public interest exception" to be applied. *Id.* at 11. Such a decision would moot the appeal, but, because the appellants asserted no public interest in resolving the legal issue presented in the appeal, the appellants have no reason to complain if a decision denying possible liability moots their appeal.

¹⁸ The commission anticipated that briefing will be completed in this appeal by June 8, 2009, and oral argument on appeal scheduled before the end of June.

Finally, as Appeals Commissioner Ulmer noted in hearing, this motion appears to be an attempt to reverse the prehearing officer's decision without a board hearing on the petition. Appellants argue they have no realistic alternative to seeking commission relief because (1) there is no procedure in place under the board's regulations to continue a hearing because an appeal is pending in the commission and (2) because the prehearing officer scheduled the petition as a preliminary matter to the hearing on the merits.

8 Alaska Admin. Code 45.070(a) provides that a "hearing may be . . . 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 Alaska Admin. Code 45.074(b) concerns a party's requests for continuances; in this context, it states that continuances will not be routinely granted and "may be continued . . . only for good cause and in accordance with this section." Nothing in section .074(b)(1) specifically addresses jurisdictional conflict or potential waste of resources in the event of a pending appeal, perhaps because both require a detailed examination of the appeal and the subject matter of the hearing. But the absence of jurisdictional conflict or adjudicative economy from the reasons a party may request a continuance does not deprive the board of its discretion to order a continuance when the board determines such considerations require it under section .070(a). Therefore, the prehearing officer's decision to refer the petition to the board for decision provides a procedure to obtain relief.

Appellants made no showing that they requested the petition be heard by the board before May 5, 2009, that a hearing time was available, and that the officer refused to set the petition for hearing before May 5, 2009. In the absence of such a showing, appellants may not argue the prehearing officer unreasonably foreclosed appellants' opportunity to allow the board to make a decision that is committed to its discretion.

Ordinarily, the commission would then issue its full decision before the end of September 2009. However, the commission may give notice of its decision sooner by bench order or written Notice of Decision. Following issuance of the April 10, 2009, Order, the parties settled their dispute and this appeal was dismissed pursuant to 8 Alaska Admin. Code 57.240(b) on April 24, 2009.

The board has the discretion to continue the hearing if there is a potential jurisdictional conflict or if considerations of adjudicative economy (for the board and parties) require a continuance. Appellants made no showing they were improperly foreclosed from a board hearing on their petition. Therefore, the commission concludes the appellants' argument that commission action is required because no relief is available before the board is without merit.

CONCLUSION

Because the appellants' rights in this appeal will not be affected and because the board, by hearing and deciding the claims delineated by the board, will not infringe on the commission's jurisdiction over the appeal of the decision limiting the evidence presented to the board, the commission will not stay the hearing based on jurisdictional considerations. Considerations of adjudicative economy may make a continuance advisable, but that is a decision that is properly within the board's discretion.

ORDER

The appellants' motion to stay proceedings before the board is DENIED.

Date: 28 Apr. 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

Appeal procedures described in the Order on Motion for Stay of Proceedings originally issued April 10, 2009, are not included in the text of this Memorandum Decision and Order, which contains the substance of the April 10, 2009, Order reformatted for publication.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Alaska Workers' Compensation Appeals Commission's Decision No. 105, Memorandum Decision and Order in AWCAC Appeal No. 09-006, *Wasser & Winters Co., Inc. v. Scott Linke*, (originally entered as an Order on Motion to Stay Proceedings on April 10, 2009), issued and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on this 28th day of April, 2009.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on 4-28-09 a copy of this Memorandum Decision and Order in Appeal No. 09-006 was mailed to: R. McLaughlin and M. Patterson at their addresses of record and faxed to: R. McLaughlin, M. Patterson, AWCB Appeals Clerk, & the Director WCD.

Signed
B. Ward, Deputy Appeals Commission Clerk