

Alaska Workers' Compensation Appeals Commission

Alaska Airlines and Eberle Vivian,
Appellants,

vs.

Melanie Nickerson,
Appellee.

Memorandum Decision and Order

Decision No. 040 April 30, 2007

AWCAC Appeal No. 06-009

AWCB Decision Nos. 06-0057, 06-0330

AWCB Case No. 199911086

Memorandum Decision and Order on appeal from Alaska Workers' Compensation Board Decision No. 06-0057, northern panel at Fairbanks issued March 3, 2006 by Fred G. Brown, Chairman, and Chris Johansen, Member for Industry, and, following remand, Alaska Workers' Compensation Board Decision No. 06-0330, by the northern panel at Fairbanks issued December 18, 2006 by Fred G. Brown, Chairman, Debra Norum, Member for Industry, and Damien Thomas, Member for Labor.

Appearances: Richard Wagg, Russell, Wagg, Gabbert & Budzinski, for appellants Alaska Airlines and Eberle Vivian. Melanie Nickerson, pro se, appellee.

Commissioners: Philip Ulmer, Jim Robison, and Kristin Knudsen.

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

By: Jim Robison, Appeals Commissioner.

We consider this case again after a remand to the board for more specific findings of fact. We retained jurisdiction to decide the appeal once the board had taken further evidence and made factual findings in response to a series of specific questions that we posed. We heard oral argument on this appeal on January 31, 2007 and, as a result of statements made by Ms. Nickerson in the course of her argument, we requested a copy of the transcript of the board's November 30, 2006 hearing. The transcript was filed February 14, 2007.

Our review of the transcript of the board's hearing and of its decision reveals that the board did not provide an adequate response to our questions. We remand this appeal again to the board with instructions.

Factual background and proceedings.

The facts of this case were discussed in detail in our earlier opinion.¹ The issues before us were whether Nickerson's claim was barred by AS 23.30.110(c) because she had not requested a hearing within two years of the employer's controversion of her claim, or whether the employer had waived the time limits of section 110(c); and whether there was substantial evidence in the record to support the board's finding that Nickerson had a present need for medical care as a result of her work-related injury.²

We remanded to the board holding that it had erred as a matter of law when it concluded that Alaska Airlines had waived enforcement of AS 23.30.110(c) against Nickerson by failing to raise the time-bar at pre-hearing conferences before the time-bar had passed. We found the board's decision failed to make adequate factual findings to allow us to determine either whether Nickerson had notice of the existence of the time-bar or whether Alaska Airlines had made an implied waiver of its right to dismissal under AS 23.30.110(c). Similarly, we found that the board had failed to make sufficient factual findings to justify its award of medical expenses, noting in particular that the decision lacked any determination of Nickerson's credibility as a witness.

Our remand explicitly instructed the board to "take evidence and make findings" on a series of specific questions as follows:

1. Was the employee informed by the board, or the staff of the Division of Workers' Compensation, or Alaska Airlines about the need to file an Affidavit of Readiness for Hearing or to request a hearing in two years after controversion of her Claim in any form besides the back of the board-prescribed form filed August 14, 2000? How was that information delivered to her? What information, and in what form, did Alaska Airlines (including

¹ *Alaska Airlines v. Nickerson*, AWCAC Decision No. 21 at 2-7 (October 19, 2006).

² *Id.* at 7-8.

information given directly by the employer as opposed to the adjuster) give Nickerson? What information, and in what form, did the board and division staff give to Nickerson? Did Nickerson acknowledge in any manner receiving the information? Was Nickerson informed of the amendment of her 2000 claim?

2. What specific affirmative statements did Alaska Airlines make that constituted a waiver of a legal right based on AS 23.30.110(c)? What conduct did Alaska Airlines engage in at a pre-hearing conference in 2001 or later, that constituted a waiver of a legal right based on AS 23.30.110(c)? Did Alaska Airlines stipulate to an extension of the time-bar and was that stipulation accepted by the board?

3. Did Nickerson seek medical care after 2002, what medical care did she obtain, and how was the medical care related to and required for the process of recovery from the employment injury?

The board heard the case on remand on November 30, 2006, but it did not take any new testimony. Instead, it apparently accepted a stipulation, drafted by the employer, providing brief answers to our questions on the first two issues; and instructed Nickerson to provide medical records as soon as possible. The board issued its decision and order on remand on December 18, 2006, noting that “[b]ased on our review of the questions submitted by the Commission and the stipulated facts supplied in response, and on our independent review of the record, we find no additional facts available to supplement the record. Accordingly, we will adopt the stipulated facts as responsive to the Commission’s questions.”³

The board found Nickerson to be a credible witness, but also found the record “remains unclear as to what specific medical treatment of her condition is required for the process of recovery from the employment injury.”⁴ In the face of this inadequate record, the board decided to “await further instruction from the Commission before determining whether to seek further clarification from the medical providers concerning

³ *Melanie Nickerson v. Alaska Airlines*, AWCB Decision No. 06-0330 at 6 (December 18, 2006).

⁴ *Id.*

what specific medical treatment of her condition is required for the process of recovery.”

Finally, on the question of the time-bar in AS 23.30.110(c), the board once again held that Nickerson’s claim was not barred, this time on the theory that Nickerson’s participation in a second independent medical examination (SIME) tolled the running of the section 110(c) time-bar clock⁵ and that because Alaska Airlines had requested the SIME it had waived running of the section 110(c) clock during the SIME process.⁶

Discussion.

Our review of the November 30, 2006 transcript reveals that the board did not hold much of a hearing or take any additional evidence in order to make the findings we requested. Instead the board accepted into the record a stipulation offered by the parties. We note with considerable concern that the record forwarded to the commission contains no such stipulation signed by the parties.⁷ The only record of the stipulation appears in the text of the board’s decision. We are further troubled that Ms. Nickerson does not appear to have had the stipulation before her at the time of the hearing; that there is no record that she signed it; and, that the board did not explain its significance to her on the record, so as to ensure that she fully understood the stipulation.

We are similarly concerned that the board failed to take any *testimony* from Ms. Nickerson as to the questions we asked to have resolved. Because Ms. Nickerson did not testify, we wonder at the board’s finding her to be a credible witness.⁸ Moreover,

⁵ The board cited to *Aune v. Eastwind, Inc.*, AWCB Dec. No. 01-0259 (December 19, 2001) and three other board decisions for the proposition that employee participation in an SIME tolls the running of section 110(c).

⁶ *Id.* at 7.

⁷ The record sent to the commission by the board’s Appeals Clerk on December 19, 2006 contains an additional 56 pages.

⁸ Although Nickerson testified in prior hearing, two board members had heard Ms. Nickerson’s earlier testimony when it was given. The board’s decision does not state that the latest panel members listened to the tape of the prior hearing so as

as we explained in our earlier Memorandum Decision and Order, “[b]ecause medical expenses are not presumed, a claimant has the burden of proving them by a preponderance of the evidence.”⁹ For that reason we asked the board to take testimony regarding Ms. Nickerson’s medical care since 2002; and its failure to do so leaves us no choice but to return the case to the board once again.

Finally, we note that the board had no evidence before it regarding any communication of an intent by Alaska Airlines to waive section 110(c), yet it still found that by requesting an SIME, the employer waived the section 110(c) time bar.¹⁰ In

to have an opportunity to assess Ms. Nickerson’s credibility as a “witness before the board.” AS 23.30.128(b).

⁹ *Alaska Airlines*, AWCAC Dec. No. 21 at 16 (citing *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 607 (Alaska 1999)).

¹⁰ We note that in AWCB Dec. No. 06-0330 at 7 the board states the employer “waived the running of Section 110(c) during the SIME process.” This finding is distinctly different from the finding the board made in its interlocutory decision and order August 19, 2005: “we further find that the employer waived its right to require the employee to file an Affidavit of Readiness at the July 20, 2001, September 5, 2001, December 11, 2001 and March 13, 2002 prehearing conferences, in which the parties agreed to proceed through the SIME process.” *Melanie Nickerson v. Alaska Airlines*, AWCB Dec. 05-0214, 6 (August 19, 2005). In the 2005 order, the board panel found that the employer *waived* the right to require the employee to file an affidavit of readiness – without time limitation. In 2006, the board panel found the employer waived the running of section 110(c) during the SIME process, that is, that the employer gave up the right to include the time that elapsed during the SIME process in the calculation of the time bar. These are different rights. We assume the board retracts its first finding and substitutes the second.

We also note the board’s criticism of the commission for considering Alaska Airline’s point on appeal regarding section 110(c), implying that the commission did not have jurisdiction over the issue because the board’s interlocutory (non-final) decision was issued “well before the Appeals Commission could have assumed jurisdiction.” AWCB Dec. No. 06-0330 at 6. A party *may not* appeal an interlocutory (non-final) administrative order to the superior court. A party *may* petition for discretionary review, but is not *required* to do so in order to preserve its right to review of a non-final order. Indeed, a court may choose not to grant review for reasons not related to the merits of the non-final order. A party may save objections to a non-final order for its appeal of the administrative body’s final decision. The board’s final decision in this case fell within the time the commission assumed jurisdiction of appeals from the board.

doing so, the board relied on a series of board decisions beginning in December of 2001 with *Aune v. Eastwind, Inc.*¹¹ Although we believe it may be time to address the validity of *Aune* and its progeny, in order to do so we require a full and complete record and set of factual findings, which we do not have before us in this case.

Conclusion and order.

Because the board failed to respond adequately to the questions posed in our earlier order, this case still presents too few facts and too little discussion of how the board reached its conclusions, to allow the commission to review the board's decision properly. We therefore REMAND this appeal to the board again, emphasizing the importance of our instruction that the board *hold another hearing to take testimony* from the parties in this case on the issues of Nickerson's notice of the section 110(c) time-bar; any conduct or statement that could be construed as an implied waiver of the section 110(c) time-bar by Alaska Airlines; the medical care that Nickerson has been receiving since 2002; and, whether it is reimbursable under the act.

For the convenience of the board, we repeat our questions:

Alaska Airlines did not waive its right to claim points of error in a non-final order when it appealed the board's final order by not petitioning for review of the non-final order to the superior court at a time when it had the option to do so.

¹¹ AWCB Decision No. 01-0259 (December 19, 2001). *Aune v. Eastwind* concluded that the board designee's decision to order an SIME prevents the parties from filing a truthful affidavit of readiness before an SIME report is distributed, but that the barrier evaporates on distribution of the report. *Id.* at 7. *Aune* does not support a conclusion that an employer who requests an SIME *waives* a right to enforcement of AS 23.30.110(c) against a controverted claim. Waiver is the voluntary relinquishment or abandonment of a known right. Once relinquished or abandoned, it cannot be reclaimed. Under *Aune*, the barrier to filing an affidavit of hearing is interposed by the designee's order and operation of law, so the tolling is not voluntary; *Aune* returns the parties to their pre-SIME status after the SIME, so there is no relinquishment of a right. Also, the board did not find that Alaska Airlines had chargeable knowledge of the *Aune* decision when it requested the SIME – that is, that the board had imposed a condition on exercise of a right to an SIME. The board's finding that Alaska Airlines waived the running of the section 110(c) time-bar during the SIME process appears to rest on an unsupported finding that, when it agreed to an SIME in the September 2001 pre-hearing conference, Alaska Airlines knew a board panel would decide months later in another case that the time-bar clock stops during an SIME.

1. Was the employee informed by the board, or the staff of the Division of Workers' Compensation, or Alaska Airlines about the need to file an Affidavit of Readiness for Hearing or to request a hearing in two years after controversion of her Claim in any form besides the back of the board-prescribed form filed August 14, 2000? How was that information delivered to her? What information, and in what form, did Alaska Airlines (including information given directly by the employer as opposed to the adjuster) give Nickerson? What information, and in what form, did the board and division staff give to Nickerson? Did Nickerson acknowledge in any manner receiving the information? Was Nickerson informed of the amendment of her 2000 claim?
2. What specific affirmative statements did Alaska Airlines make that constituted a waiver of a legal right based on AS 23.30.110(c)? What conduct did Alaska Airlines engage in at a pre-hearing conference in 2001 or later, that constituted a waiver of a legal right based on AS 23.30.110(c)? Did Alaska Airlines stipulate to an extension of the time-bar and was that stipulation accepted by the board?
3. Did Nickerson seek medical care after 2002, what medical care did she obtain, and how was the medical care related to and required for the process of recovery from the employment injury?

The commission clerk is directed to return the record to the board within 14 days of this order. We request the board to set this matter on for hearing as soon as practicable, so that this matter may be resolved without further delay. We RETAIN JURISDICTION of the appeal and we will take up the appeal promptly on return of the record and the board's decision to us.

Date: April 30, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final decision on this appeal. The commission's order requires the board to make additional findings of fact and then the commission will finish making a decision on the merits of the appeal. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or to obtain Supreme Court review are instituted.

Effective November 7, 2005 proceedings to appeal a final decision of the commission must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the Commission and all other parties to the proceedings before the Commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of the appeal, the Supreme Court may not accept an appeal.

An alternative to an appeal is to file a petition for review or rehearing under the Alaska Rules of Appellate Procedure. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal. If you decide to appeal or petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street,
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the Commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the commission's second Memorandum Decision and Order in the matter of *Alaska Airlines and Eberle Vivian v. Melanie Nickerson*; Appeal No. 06-009; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 30th day of April, 2007.

Signed

L. A. Beard, Deputy Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No. 06-009 was mailed on <u>4/30/07</u> to M. Nickerson (certified) and Wagg at their addresses of record, and faxed to Wagg, Director WCD, AWCAC Appeals Clerk and AWCAC-Fbx.	
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<u>Signed</u>	<u>4/30/07</u>
L. Beard, Deputy Clerk	Date