Alaska Workers' Compensation Appeals Commission

Voorhees Concrete Cutting and Alaska National Insurance Co.
Appellants,

vs.

Kenneth Monzulla,
Appellee.

Final Decision
Decision No. 114 August 6, 2009

AWCAC Appeal No. 08-032
AWCB Decision No. 08-0190
AWCB Case No. 199922832

Appeal from Alaska Workers' Compensation Board Interlocutory Decision and Order No. 08-0190, issued at Fairbanks, Alaska, on October 15, 2008, by northern panel members William Walters, Chair, and Jeffrey P. Pruss, Member for Labor.

Appearances: Richard L. Wagg, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants Voorhees Concrete Cutting and Alaska National Insurance Co. Kenneth Monzulla, pro se, appellee.

Commission proceedings: Motion for Extraordinary Review and Motion for Stay of Proceedings filed October 24, 2008. Opposition to motions filed November 6, 2008. Hearing on motions convened November 6, 2008; respondent's request for continuance granted by the commission panel. Hearing on motions held December 4, 2008. Motion for Extraordinary Review granted, and appellants' motion for stay of proceedings partially granted, December 16, 2008. Appellee's request for reconsideration filed December 22, 2008. Appeal filed December 24, 2008. Opposition to request for reconsideration filed December 31, 2008. Notice of Limited Intervention filed by Director January 16, 2009. Order on Motion for Reconsideration issued February 3, 2009. Extension of time to prepare record granted, February 6, 2009. Oral argument on appeal convened May 14, 2009; appellee's motion for a continuance granted by the panel. Appellee's letter, filed April 24, 2009, deemed motion for recusal of appeals

commission panel.[1] Appellants' opposition to motion for recusal filed May 21, 2009. Order denying motion for recusal issued May 27, 2009. Oral argument on appeal presented May 28, 2009.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Jim Robison, Appeals Commissioner.

This case has come before the commission for the second time on the question of the proper venue for Kenneth Monzulla's claim. Voorhees Concrete Cutting and its insurer (Voorhees) argue that substantial evidence does not support the board's second refusal to change venue from Fairbanks to Anchorage. Voorhees argues that the board abused its discretion because the evidence showed that holding the hearing in Anchorage was more convenient for the parties and witnesses and would result in substantial savings. In addition, Voorhees contends that the board impermissibly relied on its own convenience in deciding to retain venue in Fairbanks in disregard of the requirements of 8 AAC 45.072(2) and a prior commission decision.

Kenneth Monzulla argues that this commission decided the question of venue and Voorhees should not be permitted to raise it again. He also contends that the board properly retained venue in Fairbanks because the northern panel is familiar with his case and the staff in Fairbanks has been helpful to him over the years, and that moving venue to Anchorage will cause further delay.

The parties' contentions require the commission to decide whether the board abused its discretion in refusing to change the venue to Anchorage. The commission concludes that the board abused its discretion in refusing to change venue because

---

[1] Appellee filed a letter Apr. 24, 2009 (dated Apr. 28, 2009) stating he would not file a brief responding to the appellants' opening brief. With this letter, he filed a copy of a letter addressed to the Division's Chief of Adjudications, dated Jan. 26, 2009. A line was drawn through the chief's name and "appeal commission" written above it, but there was no other alteration to the letter. On May 14, 2009, the clerk notified appellants' and intervenor's counsel that the appellee's letter was deemed a motion for panel recusal and sent them a copy of it.

(1) the board erred as a matter of law by considering its own interests, and (2) the board disproportionately burdened the employer's right to present live witnesses when credibility was at issue. Moreover, the commission concludes that its prior decision upholding the board's first refusal to change venue does not operate as the law of case to prevent the board from reconsidering venue because the former issues have been resolved, a different claim is ready for hearing, and Voorhees produced new evidence on convenience now that it knows the witnesses that it intends to call. Therefore, the commission reverses the board's denial of the petition to change venue.

1. Factual background and proceedings.

There is a lengthy record in this case. We summarize only facts necessary to put the issues in the appeal in context. In our earlier decision in *Voorhees Concrete Cutting v. Monzulla*,[2] we provided the following recitation of facts from the record:

> Kenneth Monzulla worked as a concrete cutter for Voorhees Concrete Cutting in Fairbanks. He injured his back picking up a bucket of scrap rebar on November 9, 1999. A Magnetic Resonance Imaging (MRI) scan on January 25, 2000, showed a minor left sided disc bulge at the L5-S1 level of the spine, but no herniation, and early lumbar spondylosis. Although released for part-time work March 31, 2000, he was not able to continue, and on May 11, 2000, his attending physician removed him from work. The employer paid temporary total disability compensation, temporary partial disability compensation and medical benefits. . . .
>
> In November 2000, and in January 2001, the employee filed workers' compensation claims for additional temporary total disability compensation, medical benefits, attorney fees and costs, and a Second Independent Medical Evaluation (SIME). The employer filed an answer and controversion of the claim based on its medical evaluator's report. The board order the second independent medical evaluation, and the evaluation, by Marvin Bloom, M.D., took place in May 2001.
>
> . . . Monzulla and Voorhees entered into a settlement agreement that compromised and released all benefits Monzulla might claim, except future medical benefits for Monzulla's

[2] Alaska Workers' Comp. App. Comm'n Dec. No. 068 (Feb. 4, 2008).

thoracic and lumbar spine . . . . The settlement was approved by the board on September 14, 2001.

Monzulla moved from Fairbanks to the Kenai Peninsula, where he lives in . . . Clam Gulch . . . . He began treatment with Lavern Davidhizar, M.D., who prescribed pain medication, including Methadone. He was evaluated by several other physicians, and underwent MRI scans in January 2003 and September 2003. The January scan showed disc bulging and an annular tear at the L5-S1, and disc extrusion at L4-5. The September [2003] MRI scan showed a new disc extension at L5-S1.

In 2004, Dr. Davidhizar ordered another MRI scan, which showed a ruptured disc at the L5-S1 level and progression of degeneration at L4-5. Although Monzulla wanted to be evaluated for disc replacement surgery in California, neither his Fairbanks physicians nor Dr. Davidhizar recommended it. Nonetheless, Monzulla filed a claim for permanent total disability compensation, medical benefits for disc replacement surgery, travel costs, and requesting a penalty for a frivolous controversion of his benefits. In a prehearing conference, Monzulla's claims for surgery, transportation costs, and an unfair controversion penalty were set for a hearing in Fairbanks on May 5, 2005. Monzulla drove to the hearing from his home in Kenai and back. . . .

The board, after reviewing the medical evidence, determined that the evaluation [for disc replacement surgery] was not reasonable and necessary medical care. . . .

. . . Monzulla asked for reconsideration and the board denied reconsideration. Monzulla did not appeal the board's decision.

Monzulla filed a new workers' compensation claim on December 8, 2005. The issues for hearing were limited . . . to compensability of the back condition, prescriptions for a hot tub, a queen size bed, a log splitter, recliner, and toilet riser, and reimbursement of travel costs to attend the May 5, 2005, hearing.

This claim was heard on April 27, 2006. Once again, Monzulla drove to Fairbanks and back for the hearing. . . . In an interlocutory decision, the board decided that the lumbar spine "condition and symptoms are compensable." The board ordered a [SIME] by Dr. Bloom or another physician to give an opinion on the reasonableness and necessity of disc replacement

> surgery, the reasonableness and necessity of the hot tub, toilet riser, gym equipment, log splitter, and recliner as medical care devices. The board retained jurisdiction to decide the remaining claims, including the legal costs, after the SIME report.
>
> The SIME was done by Sanford Lazar, M.D. on Aug. 18, 2006. . . .
>
> Before the board issued a final opinion, Voorhees requested a change of venue to Anchorage. Monzulla opposed the change. He argued that he wanted the case to remain in Fairbanks . . . until the outstanding issues were resolved, then, he would be willing to "talk about" moving venue to Anchorage. At the March 1, 2007 hearing he testified that "You guys are doing a pretty good job there [in Fairbanks] and it gets done quicker by the sounds of it."
>
> In its final decision . . . issued March 21, 2007 . . . . [a]pplying the presumption of compensability . . . the board found that the employer had presented substantial evidence to overcome the presumption of coverage to the toilet riser, recliner, and queen-sized bed, but not as to the hot tub. . . .
>
> [T]he board awarded mileage for the trips to his neighbor's house to use the hot tub. . . . The board also awarded Monzulla the mileage claim for travel to Fairbanks for both hearings because Monzulla "ultimately prevailed on the major issues of both hearings." The board awarded interest on the log splitter from "the date of the prescription for the log splitter, January 17, 2006, through the date that device was provided to him." The board denied the renewed request for a venue change for "the reasons more fully articulated in AWCB Decision No. 07-0018. Without further explanation, it repeated the finding that "Fairbanks will better serve the balanced needs of the parties, witnesses, and the Board, and would provide a speedier remedy."[3]

In its prior interlocutory decision denying the venue change, the board explained its reasoning as follows:

> We find Anchorage would likely provide a more convenient location for out-of-state physicians to travel to the hearing, but that cannot be firmly ascertained until the specific witnesses have been clearly identified as being called live for pending hearings. We note that both parties elected to have this hearing

[3] *Monzulla*, App. Comm'n Dec. No. 068 at 2-8 (citations omitted).

> by teleconference: we cannot find that this proceeding would have been substantially more convenient in Anchorage.
>
> We have long taken administrative notice that the hearing delay in Anchorage has been consistently several months longer than in Fairbanks. We find that changing the venue of this case to Anchorage would likely delay the resolution of this case.[4]

The board's decisions on the hot tub, log splitter, transportation costs, and venue were appealed. On the venue dispute, we concluded that the board's denial of the motion for change of venue was within its discretion given the "limited evidence" on which it had to rely. However, we gave guidance to the board:

> [W]e caution the board that it may not disproportionately burden one party's access to the board by refusing a change of venue that would benefit both parties' convenience to serve the board's convenience.
>
> The regulation for change of venue at a party's request does not allow the "board's interest" to be considered. The board is not one of the parties; it exists to serve the public interest. We understand that the impact of moving more cases to a crowded docket presents a difficulty to the board and personnel shortages may result in shifting caseloads. The board has the discretion to move cases in the absence of a request under 8 AAC 45.072(3) for these reasons. However, the board may not relieve a crowded docket by disproportionately imposing costs and inconvenience on one party.
>
> We agree that the board should have mentioned its intent to take official notice of the status of the Anchorage docket at the hearing, but we consider this a harmless error. The Anchorage docket is a matter of public record. On the other hand, Monzulla's reasons for wanting to keep venue in Fairbanks, as he described them in oral argument to the commission and twice in hearing to the board, and the board's acquiescence in his request to retain the venue in Fairbanks over Voorhees' well-founded objections despite considerable inconvenience to Monzulla, may encourage a perception that the board is more friendly to Monzulla in Fairbanks than would be

[4] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 07-0018, 12 (Jan. 31, 2007) (W. Walters, chair) (citations omitted).

> the case in Anchorage. We have no reason to find that is the case in fact.[5]

After this decision, Monzulla was ordered to produce a list of all the jobs he had worked at since September 2001.[6] The parties continued to dispute Monzulla's need for disc replacement surgery; the medical record had been further developed since the board's 2005 denial of an evaluation for such surgery.[7] However, Monzulla refused to stipulate to attending a SIME on the need for disc replacement surgery, so on June 5, 2008, a hearing was held on whether to order a SIME.[8] After the parties arrived at the hearing in Fairbanks, the hearing officer informed them that no northern panel board members were available so he arranged for two southcentral panel members in Anchorage to participate by telephone.[9] After hearing hours of testimony and argument,[10] the board ultimately decided to order a SIME on the reasonableness and necessity of disc replacement surgery, but decided not to send investigative reports and videos, which Monzulla contended were inaccurate, to the SIME doctor, unless the doctor specifically requested them for his review.[11]

---

[5] *Monzulla*, App. Comm'n Dec. No. 068 at 22-23 (citations omitted).

[6] R. 3030.

[7] *E.g.,* R. 0176-77, 2386.

[8] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 08-0107, 1 (June 11, 2008) (W. Walters, chair).

[9] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 08-0190, 16 n.114 (Oct. 15, 2008) (W. Walters, chair) (noting that the southcentral panel members participated by teleconference from Anchorage after the assigned northern panel member had called the morning of hearing to report that she was unexpectedly out of state for a family emergency, but not specifying whether the parties waived their rights to an in-person hearing after being offered a continuance and advised of their rights to testify in person to the decision maker when credibility is in question). *See also* June 5, 2008, Hrg. Tr. 4:10-13.

[10] June 5, 2008, Hrg Tr. 4:3, 28:25, 56:3, 105:3 (indicating board went on the record at 10:54 a.m. and concluded the hearing at 1:52 p.m., taking a few short breaks).

[11] *Monzulla*, Bd. Dec. No. 08-0107 at 19-20.

Monzulla refused to supply the list of workplaces and Voorhees sought an order that he comply and again asked for a change of venue in July 2008, this time with affidavits and evidence.[12] Voorhees submitted the affidavit of Madeline Rush, the insurance adjuster, who estimated it would cost nearly $9,000 more to hold the hearing in Fairbanks as compared with Anchorage because the employer's medical expert would have to spend more time in Fairbanks due to flight schedules, and the employer's attorney, insurance adjuster, and investigator also would have to fly to Fairbanks and spend more billable time there than they would in Anchorage.[13]

The board heard both the discovery and the venue disputes on September 25, 2008.[14] Meanwhile, a hearing on the merits of Monzulla's claim had been set for November 14, 2008.[15] On October 15, 2008, the board denied Voorhees's request for a change of venue, and gave Monzulla two weeks to comply with the order to produce.[16] On the change of venue, the board concluded:

> The parties dispute the change of venue, and no venue stipulation has been filed under 8 AAC 45.072(1). According to the evidence available to us in the hearing record, only the employer remains in the Fairbanks area. The adjuster and employer's attorney are in Anchorage. The physicians are out of state, or in other Alaska communities. The employee resides in the Kenai Peninsula.
>
> We find Anchorage would likely provide a more convenient location for the parties or witnesses to travel to the hearing. We note that the employer and both parties' witnesses have sometimes elected to participate in the hearings by teleconference. While it is the employer's right to present Dr. Swanson in-person for the hearing on November 14, 2008, it is a matter of their election to do so.
>
> As noted in our last decision on the issue of venue, we have long taken administrative notice that the hearing delay in Anchorage

---

12 R. 2413, 2447.

13 R. 2457-58.

14 *Monzulla*, Bd. Dec. No. 08-0190 at 1.

15 R. 3048.

16 *Monzulla*, Bd. Dec. No. 08-0190 at 22.

> has been consistently several months longer than in Fairbanks. We note that the hearing on the merits of the employee's remaining claims is set for November 14, 2008 in Fairbanks. We find that changing the venue of this case to Anchorage would likely cause substantial delay in the resolution of this case.
>
> We also note this proceeding was the tenth hearing on this employee's claims. Although the June 5, 2008 hearing involved two panel members from Anchorage, their participation was ad hoc, on an emergency basis, and on a very limited issue. The Northern panel members have each spent a substantial amount of time reviewing records, hearing testimony, and considering argument by the parties, and are familiar with the record and history of this case. We find the administrative efficiency and convenience of the Board would best be served by preserving the venue in Fairbanks.
>
> Under 8 AAC 45.072(2)&(3), based on the limited evidence available, we find Fairbanks will better serve the administrative efficiency and convenience of the Board, and would provide a speedier remedy to the parties. Based on these findings, and in accord with 8 AAC 45.072, we will deny the employer's petition to change the venue of this case from Fairbanks to Anchorage.[17]

Voorhees filed a motion for extraordinary review and requested a stay of further board proceedings. Voorhees also filed a supplement to its motion, consisting of a letter dated October 24, 2008, by the Chief of Adjudications, notifying the parties that the hearing location had been changed to Anchorage, but that the venue remained in Fairbanks. Monzulla responded, opposing the motion for extraordinary review and asserting the Chief's action was "wrong and illegal."

The commission granted the motion for extraordinary review and stayed proceedings only in Fairbanks but not other venues.[18] Monzulla elected to wait for the commission's decision on appeal, rather than to proceed to a hearing in Anchorage.[19] Thus, the commission now considers whether the board abused its discretion by retaining venue in Fairbanks under 8 AAC 45.072.

---

[17] *Id.* at 21 (citation omitted).

[18] Order on Mot. for Extraordinary Review at 18.

[19] In addition, William Walters, the chair of nine prior hearings located in Fairbanks, recused himself from Monzulla's case. R. 2459-60.

2. Standard of review.

The commission reviews the board's venue decision for an abuse of discretion.[20] Abuse of discretion may occur when the board commits an error of law by not considering the appropriate factors or when substantial evidence, in light of the whole record, does not support the board's factual findings.[21]

The commission exercises its independent judgment concerning the meaning of a workers' compensation regulation.[22] "[W]e draw upon the specialized knowledge and experience of this commission in workers' compensation, and adopt the 'rule of law that is most persuasive in light of precedent, reason, and policy.'"[23]

3. The board abused its discretion in denying the change of venue because it improperly considered its own convenience and because substantial evidence did not support a finding that Fairbanks is more convenient for parties and witnesses.

The only remaining issue for the commission to decide in this appeal is whether the board erred in denying a petition to change venue.[24] The commission decides that the board erred in denying the petition to change venue. 8 AAC 45.072 provides that:

---

[20] *Monzulla*, App. Comm'n Dec. No. 068 at 24.

[21] *Alaska R & C Commc'ns v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 102, 6-7 (March 18, 2009) (describing ways discretion may be abused). *See also* AS 23.30.128(b).

[22] *See* AS 23.30.128(b) ("In reviewing questions of law and procedure, the commission shall exercise its independent judgment.").

[23] *Monzulla*, App. Comm'n Dec. No. 068 at 9 (citations omitted).

[24] A number of other issues have been resolved or are not before the commission. Voorhees withdrew its objection to the Director's limited intervention. Monzulla's request that the panel recuse itself was denied. Voorhees' attorney acknowledged in oral argument before the commission that Monzulla complied with board's order to produce a list of the jobs he has worked. Lastly, as we discussed in the order granting extraordinary review, the Chief Administrative Law Judge, not the commission, has the authority to determine whether a hearing officer interfered with the orderly presentation of evidence, so Voorhees' allegations of hearing officer bias are not before us.

> A hearing will be held only in a city in which a division office is located. Except as provided in this section, a hearing will be held in the city nearest the place where the injury occurred and in which a division office is located. The hearing location may be changed to a different city in which a division office is located if
>
> > (1) the parties stipulate to the change;
> >
> > (2) after receiving a party's request in accordance with 8 AAC 45.070(b)(1)(D) and based on the documents filed with the board and the parties' written arguments, the board orders the hearing location changed for the convenience of the parties and the witnesses; the board's panel in the city nearest the place where the injury occurred will decide the request filed under 8 AAC 45.070(b)(1)(D) to change the hearing's location; or
> >
> > (3) the board or designee, in its discretion and without a party's request, changes the hearing's location for the board's convenience or to assure a speedy remedy.

Voorhees, a party, filed its request for a change of venue under 8 AAC 45.072(2), which allows consideration of the "the convenience of the parties and the witnesses." However, the board denied the petition for a change of venue because "the administrative efficiency and convenience of the Board would best be served by preserving the venue in Fairbanks."[25] The commission has held that a petition for change of venue under 8 AAC 45.072(2) does not permit the board's convenience to be considered.[26] Although the board may change the location of a hearing for its own convenience under 8 AAC 45.072(3), this regulation does not grant the board the authority to *retain* venue for administrative convenience when a party requests a change. In a prior decision in this case, we stated, "The board is not one of the parties; it exists to serve the public interest."[27]

Unless appealed to the Alaska Supreme Court, the commission is the "final and exclusive authority" on all matters arising under the Workers' Compensation Act that

---

25 *Monzulla*, Bd. Dec. No. 08-0190 at 21.

26 *Monzulla*, App. Comm'n Dec. No. 068 at 23.

27 *Id*.

are appealed to it.[28] "Unless reversed by the Alaska Supreme Court, decisions of the commission have the force of legal precedent."[29] This structure, created by the Legislature, requires the board to follow the commission's decisions, unless the Supreme Court reverses a decision.[30] The board ignored controlling legal precedent by considering its own convenience in deciding Voorhees' request to change venue. Therefore, because the board based its decision on an impermissible consideration, the commission reverses the denial of a venue change.

The commission also has cautioned the board that it "may not relieve a crowded docket by disproportionately imposing costs and inconvenience on one party."[31] Voorhees demonstrated that the Fairbanks venue disproportionately imposed costs and inconvenience on it. The insurance adjuster's affidavit estimated it would cost Voorhees nearly $9,000 more to hold the hearing in Fairbanks as compared with Anchorage.[32] In addition, Anchorage is closer than Fairbanks to Monzulla's residence of Clam Gulch, and Voorhees' attorney and insurance adjuster are in Anchorage.[33] This evidence before the board led it to find that "Anchorage would likely provide a more convenient location for the parties or witnesses to travel to the hearing."[34]

---

[28] AS 23.30.008(a).

[29] *Id.; but see Alaska Pub. Interest Research Group v. State*, 167 P.3d 27, 45 (Alaska 2007) (holding that the decisions of the Appeals Commission "serve as legal precedent *for the Board and the Appeals Commission only*") (emphasis added).

[30] AS 23.30.008(a); *Alaska Pub. Interest Research Group*, 167 P.3d at 45.

[31] *Monzulla*, App. Comm'n Dec. No. 068 at 23.

[32] R. 2457-58.

[33] Monzulla argued to the commission that he intended to call a witness who lives in Fairbanks and who would therefore have to travel to Anchorage if the venue were moved. But, before the board, Monzulla did not argue that he was going to call this witness. Because we must base our decision on the record before the board, we cannot consider this argument. AS 23.30.128(a) (providing in part that "[e]xcept as provided in (c) of this section, new or additional evidence may not be received with respect to the appeal.").

[34] *Monzulla*, Bd. Dec. No. 08-190 at 21.

However, the board seems to have dismissed the expense associated with witness travel to Fairbanks because Voorhees was "electing" to have its witness appear in person. The board's statement about "election" implied that testimony over the telephone would be an equally effective option in this case. But we have stated, "The board cannot *require* telephonic attendance if the credibility of a party or party's witness is in issue; this is a factor that should be considered in determining if a venue change would serve the convenience of the parties and witnesses."[35] In Monzulla's case, credibility is at issue, in part because he disputes what Voorhees's investigator found. Voorhees intends to have both this investigator and an expert witness testify in person. Observing the demeanor of a witness in person is an important component of assessing credibility.[36] An expert witness may be more effective in person because he

---

[35] *Monzulla*, App. Comm'n Dec. No. 068 at 22. *See also Wolford v. Hanson,* Alaska Workers' Comp. App. Comm'n Dec. No. 030, 13 (Feb. 2, 2007) (citing *Whitesides v. State, Dep't of Pub. Safety,* 20 P.3d 1130, 1138 (Alaska 2001) (holding that due process requires in-person driver's license revocation hearings, rather than telephone hearings, when a party's credibility is in question)). As the Supreme Court recently said, it is within the trial court's discretion to allow a party witness to testify by telephone, and if the party witness is later found not to be credible, then the party witness cannot complain of the credibility determination on that basis. *Asher v. Alkan Shelter, LLC*, ___ P.3d ___, 2009 WL 2341992, *6 (Alaska 2009). There is an important distinction between allowing a witness to testify by telephone and requiring telephonic testimony or discouraging in-person testimony.

[36] *Whitesides*, 20 P.3d at 1136 (noting that "[c]ourts have emphasized the advantages inherent in a traditional hearing in which witnesses testify in the presence of the trier of fact. . . . In *Alaska Foods, Inc. v. American Manufacturer's Mutual Insurance Co.,* [the Supreme Court] held that

> when there has been oral testimony, and the trial judge has observed the witnesses in person, we must pay some deference to his judgment as to credibility to the extent that his findings are based on such oral testimony . . . because . . . we cannot have the advantage that the trial judge has had of basing a judgment as to credibility on the demeanor of the witnesses that appear before him.")

(quoting 482 P.2d 842, 845 (Alaska 1971))(footnotes omitted).

See also AS 23.30.122 (giving the board the "sole power to determine the credibility of a witness" because it is the fact-finder who hears and observes the witnesses).

or she can illustrate complex ideas by gestures or reference to illustrations. The witness can see what his questioners are referring to and assess, by their facial expressions and gestures, whether they appear puzzled and need further explanation.

The board also based its decision denying a venue change on the probability of delay. Although we have held that delay may be a relevant consideration in considering the parties' convenience, the board did not have recent evidence of the realistic degree of delay that would result from a change to Anchorage,[37] or the cost to the parties of further delay, such as evidence that surgery had been scheduled. Monzulla asserted that he did not want to lose his scheduled Nov. 14, 2008, hearing date, but he has contributed to the delays in hearing his claim by refusing to stipulate to a SIME and by resisting relevant discovery. Moreover, the board itself bears some responsibility for the delays. The issue of disc replacement surgery was first before the panel four years ago.[38] Yet, the board has still not reached a final decision and has had difficulties even providing a full panel at every hearing.[39] This history suggests that the northern panel is not more likely than any other panel to bring this case to an end quickly. Therefore, the commission concludes that the board erred in finding a possible delay, which was not supported by substantial evidence, outweighed the known monetary costs and travel time required of the parties and witnesses.

---

[37] The board relied on decisions more than eight years old to find that "the hearing delay in Anchorage has been consistently several months longer than in Fairbanks." *Monzulla*, Bd. Dec. No. 08-0190 at 21 n.126.

[38] *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 05-0137, 11 (May 19, 2005) (W. Walters, chair).

[39] In three out of nine hearings in Monzulla's case, a two-member panel, rather than a full three-member panel, decided the issues. *Monzulla*, Bd. Dec. No. 08-0190 at 22; *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 08-0126, 1 (July 2, 2008) (W. Walters, chair); *Kenneth L. Monzulla v. Voorhees Concrete Cutting*, Alaska Workers' Comp. Bd. Dec. No. 07-0370 at 1 (Dec. 18, 2007) (W. Walters, chair). In a fourth hearing, two southcentral panel members joined the Fairbanks chair by telephone to hear the matter, because no northern panel members were available. *Monzulla*, Bd. Dec. No. 08-0190 at 16 n.114; *Monzulla*, Bd. Dec. No. 08-0107 at 20.

Monzulla asserts that he wants to stay with the same hearing officer who was already familiar with the case. In cases where understanding of complex procedural disputes preceding the final adjudication is necessary, that may well be a consideration encompassed in the "convenience of the parties"; in other words, educating another hearing officer on the procedural posture of the case may inconvenience the parties. But this is not the case here. The last remaining issue to be decided is whether Monzulla's disc replacement surgery is medical treatment covered by AS 23.30.095. This is a straightforward, fact-driven issue; it does not require knowledge of the long history of the procedural disputes between the parties. Although the record in Monzulla's case is long in part because of the length of time that has passed since his injury, not all of this record is relevant to the issue before the board. In addition, two southcentral panel members are familiar with medical evidence that will be pertinent to ultimately deciding whether disc replacement surgery is reasonable and necessary because they were on the board panel that decided to order a SIME.[40] The sooner a board panel sits and hears this dispute and issues a final decision, the better.

Lastly, Monzulla argues that the commission has already decided the question of venue and Voorhees should not be permitted to raise it again.[41] We note that the law

---

[40] *See generally* June 5, 2008, hearing transcript on the issue of whether to order a SIME. The board in its decision dismissed the southcentral members' participation as being on a "very limited issue." *Monzulla*, Bd. Dec. No. 08-0190 at 21. Although whether to order a SIME presented a single issue before that panel, it encompassed a review of the recent, relevant medical history.

[41] Monzulla argues that moving venue would inconvenience him because the Fairbanks staff is more helpful to him than the Anchorage office staff. The question is whether the Monzulla requires additional guidance to bring his case to hearing that is not available in Anchorage. This was not an issue before the Fairbanks board, it had no evidence on the issue, and we cannot rule on it. Monzulla also argues on appeal that he would call witnesses residing in Fairbanks [in the hearing on his claim for medical benefits] and asserts he spends time in Fairbanks. However, he did not make these claims before the board, he had not filed a witness list before the board, and he has not changed his residence from Clam Gulch. The board had no evidence that Monzulla would incur *greater* costs if venue changed. The commission's review of the board's decision is limited the board's record of evidence when it made the decision, and it cannot accept new or additional evidence with respect to the appeal. AS 23.30.128(a).

of the case doctrine generally prohibits the reconsideration of issues that have been adjudicated in a previous appeal in the same case.[42] However, the law of the case is a "matter of judicial policy, not law," and does not limit a tribunal's power but "merely expresses the practice of courts generally to refuse to reopen what has been decided."[43] Our prior decision left open the possibility that the parties could again request a venue change if another hearing was needed. Although we upheld the board's decision to retain venue in Fairbanks, we based this in part on the lack of sufficient evidence on the number and location of witnesses for the board to decide the matter. The board itself left the matter open by stating that "Anchorage would likely provide a more convenient location for out-of-state physicians to travel to the hearing, but *that cannot be firmly ascertained until the specific witnesses have been clearly identified* as being called live for pending hearings."[44] With its second petition for change of venue, Voorhees provided this evidence, clearly identifying the witnesses it will call for the hearing and the others who will need to attend the hearing on the necessity of disc replacement surgery, and the costs associated with a hearing in Fairbanks. Moreover, Monzulla himself apparently agreed that once the disputes about travel costs for two prior hearings, the hot tub, and other medical equipment were resolved, he would be willing to discuss a change of venue.[45] Therefore, we conclude that law of the case doctrine does not prevent us from reversing the board's most recent denial of a venue change.

---

[42] *E.g., Beal v. Beal*, ___ P.3d ___, 2009 WL 1626273 at *3 (Alaska 2009); *Dieringer v. Martin*, 187 P.3d 468, 473 (Alaska 2008); *Wolff v. Arctic Bowl, Inc.,* 560 P.2d 758, 763 (Alaska 1977).

[43] *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1228 (Alaska 1992) (citations omitted). *See also Wolff*, 560 P.2d at 763 n.5 (noting that law of the case doctrine "operates only in the particular case and only as a rule of policy, not law").

[44] *Monzulla*, Bd. Dec. No. 07-0018 at 12 (emphasis added).

[45] *Monzulla*, App. Comm'n Dec. No. 068 at 7 (citing R. 0296).

4. Conclusion.

The board abused its discretion in refusing to change venue from the northern (Fairbanks) venue to the southcentral (Anchorage) venue because it relied on an impermissible consideration, its own interest, under 8 AAC 45.072(2) and because it lacked sufficient evidence to find that Fairbanks was a more convenient forum than Anchorage for the parties and witnesses. The board's Order Paragraph 2 of Interlocutory Decision and Order No. 08-0190, denying the petition for change of venue, is REVERSED.

Date: *August 6, 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission REVERSED the board's denial of the petition to change of venue to the southcentral venue, but Order Paragraph 1 in Interlocutory Decision and Order No. 08-0190 was not changed by this decision. The appeals commission did not retain jurisdiction.

The appeals commission's decision does not end all administrative proceedings on Mr. Monzulla's claim. The Workers' Compensation Board may continue its proceedings, but the effect of this decision is to change venue to the southcentral venue (Anchorage). It does not affect any other pending claims or petitions in the employee's case at the Workers' Compensation Board. This decision becomes effective when the appeals commission mails or otherwise distributes it unless proceedings to reconsider it or to appeal, if appeal is available, to the Alaska Supreme Court are instituted.

Because this is not a final decision on the merits of Kenneth Monzulla's claim, you may choose to reserve your right to an appeal of this decision until the final decision is issued by the Workers' Compensation Board or you may choose to seek Supreme Court review of this decision now. In other words, if the Board's final decision on the merits of the claim is adverse to you, you may appeal that decision and, if the commission affirms the Board, you may appeal both this decision and the decision on the merits to

the Supreme Court at the same time. If the Board's final decision on the merits of the claim is in your favor, but the opposing party appeals, you may reserve your right to appeal this decision if the commission's decision on the opposing party's appeal is appealed to the Supreme Court.

Because this is not a final decision on the merits of the workers' compensation claim, the Supreme Court might not accept an appeal. However, other forms of Supreme Court review, such as a petition for hearing or petition for review, are available under the Alaska Rules of Appellate Procedure. You must file such petitions within 10 days of the date this decision was mailed or otherwise distributed to you.

If you wish to appeal this decision now, proceedings to appeal, if appeal is available, must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed to you. The appeal must be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

To see the date this decision is mailed or otherwise distributed, look at the clerk's Certificate of Distribution in the box below.

If you wish to appeal, or seek other review of this decision by the Alaska Supreme Court now, instead of reserving an appeal until the final decision on the merits of the claim is issued, 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 BY THE APPEALS COMMISSION

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

If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed or otherwise distributed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f) lists the reasons you may request reconsideration.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 114, the final decision and order in the matter of *Voorhees Concrete Cutting and Alaska National Insurance Co. v. Kenneth Monzulla*, Appeal No. 08-032, dated and filed in the office of the Alaska Workers'

Compensation Appeals Commission in Anchorage, Alaska, this *6th* day of *Aug.*, 20*09*.

Signed
B. Ward, Deputy Appeals Commission Clerk

Certificate of Distribution (*Amended*)

I certify that on *8-6-09* a copy of this Decision No. 114, the Final Decision and Order in AWCAC Appeal No. 08-032, was mailed to K. Monzulla (certified), E. Pohland, & R. Wagg at their addresses of record and faxed to Wagg, Director WCD, AWCB Fbx, AWCB Appeals Clerk, & Erin Pohland.

Signed
B. Ward, Deputy Appeals Commission Clerk