

Alaska Workers' Compensation Appeals Commission

Michael A. Israelson,
Appellant,

vs.

Alaska Marine Trucking, LLC and ACE
American Insurance Company,
Appellees.

Final Decision

Decision No. 226 May 27, 2016

AWCAC Appeal No. 15-022
AWCB Decision No. 15-0101
AWCB Case No. 201018445

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 15-0101, issued at Juneau, Alaska, on August 20, 2015, by southern panel members Marie Marx, Chair, Bradley S. Austin, Member for Labor, and Charles M. Collins, Member for Industry.

Appearances: Thomas J. Slagle, attorney, and Daniel G. Bruce, Baxter Bruce & Sullivan, co-counsel, for appellant, Michael A. Israelson; Aaron M. Sandone, Griffin & Smith, for appellees, Alaska Marine Trucking, LLC and ACE American Insurance Company.

Commission proceedings: Appeal filed September 21, 2015; briefing completed February 1, 2016; oral argument held on February 25, 2016.

Commissioners: Michael J. Notar, S. T. Hagedorn, Andrew M. Hemenway, Chair *pro tempore*.

By: Andrew M. Hemenway, Chair *pro tempore*.

1. Introduction.

Michael Israelson, with the assistance of counsel, won his claim for workers' compensation benefits. His attorney filed an affidavit of services one day late. As a result, the Alaska Workers' Compensation Board (Board) awarded the minimum attorney's fee. We reverse and remand to the Board to award a reasonable attorney's fee under AS 23.30.145(a).

2. *Factual background and proceedings.*¹

Michael Israelson injured his back on May 14, 2008, and on December 6, 2010, while employed by Alaska Marine Trucking, LLC (Alaska Marine).² Dr. Douglas Bald, an orthopedic surgeon, conducted an employer's medical evaluation in October 2012; he diagnosed preexisting lower lumbar degenerative disc disease, but concluded that the 2008 injury was a substantial factor in Mr. Israelson's low back condition and that the 2010 injury was the substantial cause of his low back condition and need for medical treatment.³

Mr. Israelson stopped working on December 6, 2012, because of worsening back pain.⁴ Alaska Marine paid temporary total disability benefits beginning at that time.⁵ Mr. Israelson was found to be medically stable by his treating physician, Dr. John Bursell, in August 2013, was rated as eight percent permanently partially disabled,⁶ and in September 2013, Alaska Marine paid him a permanent partial impairment benefit.⁷ Dr. Bald, following a November 2013, examination, agreed that Mr. Israelson was medically stable, and again expressed the opinion that the 2010 injury was the

¹ We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

² *Michael A. Israelson v. Alaska Marine Trucking, LLC and ACE American Insurance Company*, Alaska Workers' Comp. Bd. Dec. No. 15-0101 at 3, 4 (Nos. 1, 13) (Aug. 20, 2015).

³ *Israelson*, Bd. Dec. No. 15-0101 at 5-6 (No. 24).

⁴ *Id.* at 7 (No. 37).

⁵ R. 16. *See Israelson*, Bd. Dec. No. 15-0101 at 7 (No. 35). Alaska Marine had previously paid temporary total disability benefits based on the 2010 injury for several short periods of time from December 2010 until September 2012. *Id.*

⁶ *Israelson*, Bd. Dec. No. 15-0101 at 4-6 (Nos. 14-23, 25-29).

⁷ R. 16.

substantial cause of his need for medical treatment.⁸ On referral from Dr. Bursell, in February 2014, neurosurgeon Brian Miller, D.O., recommended back surgery.⁹

Karl Goler, M.D., a neurosurgeon, performed an employer's medical evaluation in March 2014; in his opinion, Mr. Israelson's preexisting degenerative disc disease was the substantial cause of his back condition and need for treatment.¹⁰ Based on Dr. Goler's report, in April 2014, Alaska Marine controverted all benefits.¹¹ Neurosurgeon Bruce McCormack, M.D., a Board-appointed medical expert, examined Mr. Israelson in December 2014, and concluded that Mr. Israelson's underlying disc disease was the substantial cause of his disability and need for medical treatment, that the December 2010, injury was a temporary aggravation of that preexisting condition that had resolved within four months, and that Mr. Israelson was not a candidate for surgery.¹² Ultimately, Mr. Israelson had surgery on June 4, 2015, which he testified has provided significant pain relief.¹³

In March 2015, Mr. Israelson's claim for additional workers' compensation benefits, including attorney's fees, was scheduled for hearing by the Board on Tuesday, June 23, 2015.¹⁴ On Friday, June 19, 2015, counsel for Mr. Israelson filed two affidavits for attorney's fees, one for his lead counsel, Thomas Slagle, itemizing 105.3 hours of attorney time at the claimed rate of \$325 per hour (\$34,225 plus local sales tax), and the other for co-counsel Daniel Bruce, itemizing 7.8 hours of attorney time at the claimed rate of \$300 per hour plus 7.3 hours of paralegal time at claimed rates of \$150 and \$165 per hour (\$3,442.50), plus costs (\$4,881.18).¹⁵ The case was heard as

⁸ *Israelson*, Bd. Dec. No. 15-0101 at 6 (No. 31).

⁹ *Id.* at 7 (No. 33).

¹⁰ *Id.* at 7 (No. 34).

¹¹ *Id.* at 7 (No. 36).

¹² *Id.* at 7 (No. 38).

¹³ *Id.* at 8 (No. 44), 9 (No. 52).

¹⁴ *Id.* at 8 (Nos. 39, 40).

¹⁵ *Id.* at 9 (No. 47).

scheduled, on Tuesday, June 23, 2015. Mr. Slagle filed a supplemental affidavit of fees on June 26, 2015, itemizing an additional 35.9 hours of attorney time at the claimed rate of \$325 per hour (\$11,667.00 plus local sales tax).¹⁶ Additional fees were claimed for a scheduled post-hearing deposition.¹⁷

On August 20, 2015, the Board issued a decision granting Mr. Israelson's claim for additional benefits, observing that the employer's first evaluating physician, Dr. Bald, had concluded that Mr. Israelson's work injury was the substantial cause of his need for medical treatment,¹⁸ and placing more weight on the opinion of his treating physician, Dr. Bursell, than on the contrary opinions of both the employer's second evaluating physician, Dr. Goler, and the Board's own expert, Dr. McCormack.¹⁹ The Board denied a penalty, on the ground that Mr. Israelson had not shown Alaska Marine's controversion was improper.²⁰ It awarded statutory minimum attorney's fees, on the ground that the affidavit of fees was not timely filed in accordance with 8 AAC 45.180, and that Mr. Israelson had not shown grounds to waive or modify the filing requirement pursuant to 8 AAC 45.195.²¹

3. *Standard of review.*

Mr. Israelson has raised two issues on appeal to the Alaska Workers' Compensation Appeals Commission (Commission): (1) whether the Board erroneously failed to impose a late payment penalty, and (2) whether the Board erroneously failed to excuse the late filing of an affidavit of attorney's fees. We must uphold the Board's factual findings if they are supported by substantial evidence in light of the whole record.²² On questions of law and procedure, we do not defer to the Board's

¹⁶ *Israelson*, Bd. Dec. No. 15-0101 at 10 (No. 56).

¹⁷ *See id.*

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 19.

²⁰ *Id.* at 23.

²¹ *Id.* at 23-24.

²² AS 23.30.128(b).

conclusions. We exercise our independent judgment.²³ Where the Board has discretion, we review its decision for abuse of that discretion. An abuse of discretion may be found to have occurred when a decision leaves the Commission with “a definite and firm conviction based on the record as a whole that a mistake has been made.”²⁴

4. *Discussion.*

a. *Mr. Israelson did not show a bad faith controversion.*

Mr. Israelson argues that the Board should have imposed a late payment penalty, because the medical opinion that Alaska Marine relied on when it controverted his claims was discredited by the Board at the hearing. He argues that absent a penalty, “a carrier could abuse the system by ‘doctor shopping’ to deny or delay payment of benefits.”²⁵

The law and the relevant facts with respect to this issue are straightforward. AS 23.30.155(e) provides for imposition of a penalty when an installment of compensation payable without award is not made within seven days after it becomes due. However, AS 23.30.155(a) provides that compensation need not be paid without award “where liability to pay compensation is controverted by the employer.” In order to avoid a penalty, the controversion must be filed in good faith.²⁶ The burden of proof to show that a controversion was filed in bad faith is on the claimant.

Doctor shopping, in general, is addressed by limiting the number of times an employer may make a change of physicians, not by imposing a penalty.²⁷ More

²³ AS 23.30.128(b).

²⁴ *Church v. Arctic Fire and Safety*, Alaska Workers’ Comp. App. Comm’n Dec. No. 126 at 12 (Dec. 31, 2009), quoting *Black v. Municipality of Anchorage, Bd. of Equalization*, 187 P.3d 1096, 1099 (Alaska 2008). See also, *T & G Aviation, Inc. v. Footh*, 792 P.2d 671 (Alaska 1990) (“we are not left with a definite and firm conviction that the superior court erred in ruling that Footh’s request for attorney’s fees, filed 70 days after entry of judgment, was filed within a ‘reasonable time’. . . .”) (citations omitted).

²⁵ Appellant’s Brief at 28.

²⁶ *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

²⁷ AS 23.30.095(e).

specifically, at the hearing Mr. Israelson made no attempt to establish a lack of good faith.²⁸ Rather, Mr. Israelson argues on appeal that because the Board found Dr. Goler's opinion not credible, Alaska Marine ought not to have relied on it as a ground for controverting his claim. But that the Board, following a hearing, found the opinion of the employer's second evaluating physician (Dr. Goler) less persuasive than the contrary opinion of the employer's first evaluating physician (Dr. Bald) (among others) does not mean that Alaska Marine could not in good faith rely on Dr. Goler's opinion when it controverted benefits. The Board did not err in declining to impose a penalty.

b. Failure to extend the time was an abuse of discretion.

The primary issue in this case concerns the Board's award of statutory minimum attorney's fees. Under the Board's regulations, an attorney requesting an award of attorney's fees in excess of the statutory minimum must file an affidavit itemizing the work performed at least three working days in advance of the scheduled hearing; at the hearing, the attorney may testify regarding work performed after the affidavit was filed.²⁹ In this case, a hearing was scheduled for Tuesday, June 23, 2015. Accordingly, counsel's affidavit of fees was due to be filed no later than Thursday, June 18, 2015: three working days prior to the scheduled hearing. Mr. Slagle and his co-counsel, Mr. Bruce, filed their affidavits of fees on Friday, June 19, 2015, one day late, albeit four days prior to the scheduled hearing date.³⁰

Alaska Marine filed an objection to an award of more than the statutory minimum on June 22, 2015, on the ground that the affidavits of fees were not timely filed, and arguing in the alternative that the amount awarded be reduced on the ground

²⁸ Counsel for Mr. Israelson did not dispute the chair's observation, at the hearing, that "The employee most recently withdrew its [*sic*] request for unfair, frivolous controversion." Hr'g Tr. at 7:7-9, June 23, 2015.

²⁹ 8 AAC 45.180(b), (d)(1).

³⁰ *Israelson*, Bd. Dec. No. 15-0101 at 9 (No. 47). See R. 637-642, 1706-1712.

that the amount claimed was excessive.³¹ At the hearing, the parties stipulated to the submission of a post-hearing supplemental affidavit regarding fees incurred after the June 19, 2015, affidavit, but no mention was made of Alaska Marine's objection based on the late filing of the June 19, 2015, affidavit.³² Following the hearing Mr. Slagle filed affidavits explaining that he had been unable to format his fee request and that on the morning of June 18, 2015, he contacted his transcriptionist to assist in that endeavor, but she was otherwise occupied and unable to assist him until the next morning.³³ Mr. Slagle received the properly formatted fee request from his transcriptionist at 7:18 a.m. on June 19, 2015.³⁴ The fee request was filed and served by email and first class mail on opposing counsel that same day.³⁵

The Board concluded that Mr. Israelson had not established grounds to waive compliance with 8 AAC 45.180 pursuant to 8 AAC 45.195, because Mr. Slagle is experienced in workers' compensation proceedings, he did not seek assistance from another person when his transcriptionist informed him she was unavailable to assist in formatting his fee request, he did not seek an extension of time or "otherwise attempt[] to file a timely fee affidavit" (*e.g.*, timely file an affidavit accompanied by a handwritten or summary statement of time), and he provided no reason at all for the late filing by Mr. Bruce.³⁶

We do not condone Mr. Slagle's lapse, nor do we consider it to be excusable neglect. Similarly, we do not see that failing to provide verbal notice or to file any document at all within the time allowed constitutes substantial compliance with

³¹ *Israelson*, Bd. Dec. No. 15-0101 at 9 (No. 48). *See* R. 643-646.

³² Hr'g Tr. at 211:11 – 215:12.

³³ *Israelson*, Bd. Dec. No. 15-0101 at 10 (No. 55). *See* R. 666-675.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See Israelson*, Bd. Dec. No. 15-0101 at 23.

8 AAC 45.180.³⁷ But in our view the issue in this case is not whether Mr. Slagle substantially complied with 8 AAC 45.180, or whether the Board should have excused his non-compliance, pursuant to 8 AAC 45.195.³⁸ Rather, the issue is whether, under the specific facts of this case, the Board abused its discretion by failing to extend the time allowed for filing a fully-compliant affidavit of fees, pursuant to 8 AAC 45.063(b).³⁹

In that regard, we note that 8 AAC 45.063(b) does not provide a mechanism by which the Board may extend applicable statutory deadlines, such as those established in AS 23.30.105(a), AS 23.30.110(c), and AS 23.30.127(a): by its terms, 8 AAC 45.063(b) is limited to the extension of time periods established by the Board's regulations. In addition, we note that with respect to time deadlines, 8 AAC 45.063(b) is the more specifically applicable regulation than 8 AAC 45.195: under the latter regulation, the Board may excuse the failure to file any affidavit at all, not merely the late filing of an affidavit otherwise compliant with 8 AAC 45.180.⁴⁰ We conclude that it is 8 AAC 45.063(b), not 8 AAC 45.195, that governs the Board's exercise of discretion with respect to extensions of time established by regulation.

8 AAC 45.063(b) provides that the Board will, in its discretion, extend time deadlines upon a petition and for good cause. In this case, no written petition for an

³⁷ As we have previously observed, late compliance is non-compliance, not substantial compliance. *See Providence Health Sys. v. Hessel*, Alaska Workers' Comp. App. Comm'n Dec. No. 131 at 12 (Mar. 24, 2010); *Lawson v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 110 at 24 (May 29, 2009).

³⁸ 8 AAC 45.195 states:

A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

³⁹ 8 AAC 45.063(b) states:

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

⁴⁰ *See Circle de Lumber Co. v. Humphrey*, 130 P.3d 941 (Alaska 2006) (affirming Board decision to award 35% of fee requested, absent a fee affidavit).

extension of time was filed. However, implicit in the filing of a late, pre-hearing affidavit of attorney's fees is a request for an extension of time to file the affidavit. Moreover, Mr. Slagle's post-hearing response to Alaska Marine's objection to the late filing of the affidavit was, in effect, a written request for an extension of time, even though it referred to 8 AAC 45.195, rather than to 8 AAC 45.063(b), as the basis for the request.⁴¹ We conclude that Mr. Slagle substantially complied with the requirement in 8 AAC 45.063(b) that an extension of time be requested by petition.

Turning to the question of good cause, we observe that under 8 AAC 45.063(b), a party requesting an extension of time need not show that to deny an extension would result in manifest injustice. It bears mention, however, that the apparent effect of the Board's order was to reduce the attorney's fees from the claimed amount of \$49,334.50 to \$2,269 plus 10% of ongoing temporary total disability payments,⁴² an amount that on the record before us appears to be grossly disproportionate to the services rendered by counsel. Moreover, 8 AAC 45.063(b) does not expressly limit the Board's consideration of good cause to consideration of the reasons for the failure to meet the deadline in the first place (*i.e.*, excusable neglect), nor does it expressly limit the Board's authority to grant an extension of time after the original deadline has passed. Accordingly, the regulation may reasonably be interpreted to provide the Board with discretion to grant extensions of time as may be appropriate under all of the circumstances, either before or after the applicable deadline.⁴³

In this case, the delay in filing was minimal, and the late filing was not a recurring event. Because the affidavit was submitted four days before the hearing and

⁴¹ See R. 675.

⁴² See Appellant's Brief at 11-12.

⁴³ See AS 23.30.135 ("In . . . conducting a hearing the board is not bound . . . by technical or formal rules of procedure, except as provided by this chapter."). Consistent with this statutory mandate, we interpret the Board's regulations governing hearing procedures in a manner that maximizes the Board's discretion. The Alaska Supreme Court's rules provide equivalent discretion. See Appellate Rule 502(b) (extension may be granted before or after the allowed time period, "either on motion of a party, showing good cause, or sua sponte").

because it was otherwise in compliance with 4 AAC 45.180,⁴⁴ the late filing was not disruptive to the orderly presentation or consideration of the relevant evidence by the Board and was not contrary to the quick, efficient, and fair conduct of the hearing.⁴⁵ The affidavit was delivered to Alaska Marine on the same day it was filed, and Alaska Marine did not assert that the delay in filing was in any manner prejudicial to it, much less submit any evidence to support such a claim. In addition, the failure to grant an extension of time effectively eliminated a workers' compensation benefit to which Mr. Israelson was otherwise entitled.⁴⁶

5. Conclusion.

When the circumstances warrant, the Board has exercised its discretion to provide additional time to file an affidavit of attorney's fees.⁴⁷ In this case: (1) the delay in filing was minimal; (2) the late affidavit was otherwise compliant with 8 AAC 45.180; (3) the affidavit was delivered to opposing counsel on the date of filing;

⁴⁴ Compare, *Williams v. Abood*, 53 P.3d 124 (Alaska 2002) (affirming Board's decision not to consider late affidavit where initial, timely affidavit was "largely undecipherable and . . . inaccurate.").

⁴⁵ See AS 23.30.001(1).

⁴⁶ See AS 23.30.001(2) (establishing legislative intent that "workers' compensation cases shall be decided on their merits except where otherwise provided by statute.") (emphasis added). See generally *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

⁴⁷ See *Bermel v. Banner Health Sys.*, Alaska Workers' Comp. Bd. Dec. No. 08-0239 (Dec. 5, 2008) (granting employee's counsel 14 days from date of decision to file affidavit of fees). Trial courts have exercised similar discretion. See, e.g., *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*, 322 P.3d 114 (Alaska 2014) (affirming trial court's grant of motion to enlarge time to file motion for attorney's fee filed seven days after due date for filing motion for attorney's fee and affirming trial court's grant of motion to enlarge time to file cost bill filed eight months after expiration of filing date); *Worland v. Worland*, 193 P.3d 735 (Alaska 2008) (granting untimely motion for attorney's fees absent any showing of excusable neglect); *Alderman v. Iditarod Properties, Inc.*, 32 P.3d 373 (Alaska 2001) (affirming trial court's grant of additional 70 days to file conforming motion).

(4) there was no prejudice to a party;⁴⁸ (5) there was not a pattern of failure to meet deadlines by the claimant or his counsel;⁴⁹ and (6) the fee awarded does not appear to be reasonable compensation as compared with the fee claimed. In light of the facts of this case, we are left with the definite and firm conviction that the Board was mistaken in not providing a one day extension of time for filing an affidavit of attorney's fees.

The Board's decision to deny a penalty is AFFIRMED; the Board's award of attorney's fees is VACATED and this matter is REMANDED to the Board for award of a reasonable attorney's fee under AS 23.30.145(a).

Date: May 27, 2016 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Andrew M. Hemenway, Chair *pro tempore*

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

⁴⁸ See *ConocoPhillips Alaska, Inc. v. Williams Alaska Petroleum, Inc.*, 322 P.3d 114, 135 (Alaska 2014) ("[W]hen there is no showing of prejudice, it may be an abuse of discretion *not* to allow an untimely motion for attorney's fees on facts such as those presented in this case.") (emphasis in original).

⁴⁹ Compare, *Williams v. Abood*, 53 P.3d 124 (Alaska 2002) (affirming Board's decision not to consider late affidavit where initial, timely affidavit was "largely undecipherable and . . . inaccurate.").

If you wish to appeal 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 AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 226 issued in the matter of *Michael A. Israelson vs. Alaska Marine Trucking, LLC and ACE American Insurance Company*, AWCAC Appeal No. 15-022, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on May 27, 2016.

Date: May 31, 2016



Signed

K. Morrison, Appeals Commission Clerk