

Alaska Workers' Compensation Appeals Commission

Mohamed D. Omar,
Appellant,

vs.

Unisea, Inc. and Alaska Nat'l Ins. Co.,
Appellees.

Memorandum Decision and Order
Decision No. 053 August 27, 2007

AWCAC Appeal No. 06-029
AWCB Decision No. 06-0272
AWCB Case No. 199903372

Appeal from Alaska Workers' Compensation Board Decision No. 06-0272 issued October 5, 2006, by the southcentral panel at Anchorage, Rebecca Pauli, Designated Chair, Patricia A. Vollendorf, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Mohamed D. Omar, *pro se*, appellant. Michelle Meshke, Russell, Wagg, Gabbert & Budzinski, for appellees Unisea, Inc. and Alaska National Insurance Co.

Commissioners: John Giuchici, Stephen T. Hagedorn, and Kristin Knudsen.

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

By: Stephen T. Hagedorn, Appeals Commissioner.

This appeal concerns whether Appellant Mohamed Omar timely filed an affidavit of readiness for hearing under AS 23.30.110(c). The board determined that Omar's claims were barred under AS 23.30.110(c) because he filed his affidavit of readiness for hearing on November 8, 2005, more than two years after the employer, Unisea, controverted his claim.¹ Because his claims were time-barred, the board did not review the merits of Omar's claims. Omar appealed, challenging the board's failure to consider an affidavit of readiness for hearing which he filed on August 14, 2003.²

¹ The board recorded receiving this document on November 9, 2005. Omar wrote in two different dates of mailing, July 26, 2005, and November 7, 2005. The board evaluated the timeliness of this document with respect to both dates.

² Omar did not challenge the time computation or rules applied with respect to his late-filed affidavits of readiness for hearing.

Our review of the record convinces us that the board erred. The board erred because it failed to determine whether Omar's August 2003 affidavit of readiness for hearing³ was valid or invalid. We remand to the board to determine if Omar complied with AS 23.30.110(c) when Omar filed his August 2003 affidavit of readiness for hearing.

Factual background and board proceedings.

Mohamed Omar reported that he injured his lower back on March 1, 1999, when he slipped and fell while cleaning under equipment at the Unisea processing plant in Unalaska.⁴ He made a report of occupational injury or illness on March 2, 1999.⁵ Unisea paid medical and compensation benefits to Omar through December 4, 2000.⁶

On April 10, 2001, Omar filed a workers' compensation claim for temporary total disability, permanent partial impairment, and medical expenses.⁷ Unisea controverted all benefits through a notice dated May 16, 2001, stating that Omar was medically stable, had no ratable permanent partial impairment, and was physically able to return to work.⁸ At a pre-hearing conference on July 9, 2001, Omar amended his claim to include temporary total disability benefits from December 5, 2000, to the date of medical stability, permanent partial impairment benefits, medical costs incurred from August 14, 2000, and continuing thereafter, and vocational benefits.⁹ Omar also

³ R. 0060. This document was signed and dated by Omar on August 12, 2003, so the board referred to it as the August 12, 2003 affidavit of readiness for hearing. The board received the document and, hence, it was filed, on August 14, 2003. To avoid confusion, we refer to it as the August 2003 affidavit.

⁴ When summarizing the facts of record, we do not make findings of fact. AS 23.30.122, AS 23.30.128(b). Our summary provides context for our discussion of the issues on appeal. We provide citation to the record to assure the parties that we have not gone beyond the board record and the board's findings.

⁵ R. 0001.

⁶ R. 0003, 0009, 0011, 0015, and 0018.

⁷ R. 0027-0028.

⁸ R. 0021 (received by the board on May 18, 2001).

⁹ It is unclear whether the board accepted this amendment, which was not made in writing. The only evidence of the amendment is the oral representation

requested a compensation rate adjustment and attorney fees and costs. Unisea controverted this amended claim on October 4, 2001.¹⁰

The board received Omar's second claim, dated May 6, 2002, on May 16, 2002.¹¹ In addition to the claim he had already made, Omar sought recovery for penalties and unfair controversion.¹² Unisea controverted this claim on June 11, 2002.¹³ On May 16, 2002, Omar filed an affidavit of readiness for hearing.¹⁴ The board rejected this affidavit of readiness for hearing because Omar failed to serve it on the employer.¹⁵

At a June 24, 2002, pre-hearing conference the parties agreed that Omar should have a second independent medical evaluation (SIME).¹⁶ The SIME process was completed March 27, 2003, when all SIME reports were filed with the board. On August 14, 2003, Omar filed a new affidavit of readiness for hearing on a board form.¹⁷ The document correctly referenced case number 199903372 and the date of injury. In box 12 of the form, the affiant is asked to indicate that he is prepared for a hearing on issues presented in either an "application" or a "petition." Omar did not check either option in box 12. In the blank line provided in box 12 asking the affiant to identify the petition for which a hearing is requested, Omar wrote "08-08-03." There is neither an application (a claim) nor a petition of either party filed on or about August 8, 2003.

Throughout much of this process, Omar was represented by an attorney,

memorialized in the hearing officer's pre-hearing conference summary wherein the hearing officer appears to accept the oral amendment. R. 0089. Unrepresented persons often verbally amend their claims, petitions, and defenses in pre-hearing conferences, as allowed by 8 AAC 45.065(a)(2).

¹⁰ R. 0022-0023.

¹¹ R. 0040-0041.

¹² R. 0040-0041.

¹³ R. 0024-0025.

¹⁴ R. 0046.

¹⁵ The board notified Omar that it rejected his May 16, 2002 affidavit of readiness for hearing on June 24, 2002. R. 0653.

¹⁶ R. 0652-653.

¹⁷ R. 0060.

Mr. Timothy Bricton. Omar retained Bricton by June 30, 1999, when Bricton sent his entry of appearance to the board.¹⁸ At the June 24, 2003 pre-hearing conference, Bricton gave verbal notice that he intended to withdraw as counsel to Omar.¹⁹ Bricton did not withdraw in writing until September 11, 2003, when he filed a letter with the board indicating that he would no longer be representing Omar.²⁰

Unisea filed a petition to dismiss on November 16, 2005. Unisea asserted that Omar's claims dated April 10, 2001, and May 6, 2002, were time-barred under AS 23.30.110(c) because Omar had not filed a timely affidavit of readiness for hearing.²¹

The board's decision.

The board issued its decision on October 5, 2006. The question before the board was whether the employee filed an affidavit of readiness for hearing within the time limits of AS 23.30.110 (c). This statute requires the board to dismiss a claim if an employee does not request a hearing within two years following the filing of a controversion notice.

The board found that Omar filed claims on April 10, 2001, and on May 6, 2002. Unisea controverted the April 10, 2001 claim on May 16, 2001, and on October 4, 2001.²² Unisea controverted the May 6, 2002 claim on June 11, 2002.²³ The board, however, found that the SIME process tolled the running of the limitations period created in AS 23.30.110(c). The board thus held that the SIME process as applied to

¹⁸ R. 0026; R. 0035. The board received Bricton's notice of appearance on July 6, 1999.

¹⁹ R. 0672-0673.

²⁰ R. 0678. On his August 2003 affidavit of readiness for hearing, Omar used the term "N/A" to complete box 14 asking for the name, if any, of his attorney. The record also shows that Omar told board staff that he was no longer represented and that the staff sought confirmation of his representation status prior to the September 11, 2003 pre-hearing conference. R. 0674.

²¹ R. 0068-0069.

²² R. 0021; R. 0022-0023.

²³ R. 0024-0025.

Omar tolled the running of the 2-year limitations period for 39 weeks and 3 days.

Applying the limitations period of AS 23.30.110(c), and taking the tolling period into account, the board concluded that Omar had until January 16, and July 6, 2004, respectively, to request a hearing with respect to Unisea's controversies dated May 16 and October 4, 2001 (regarding Omar's April 10, 2001 claim). Similarly, the board concluded that Omar had until February 6, 2005, to request a hearing with respect to Unisea's controversy of June 11, 2002²⁴ (regarding Omar's May 6, 2002 claim). The board found that the earliest date of an affidavit of readiness for hearing filed by Omar was July 26, 2005.²⁵ Because Omar filed the July 26, 2005 affidavit of readiness for hearing well after the July 6, 2004, and February 6, 2005 deadlines, the board dismissed Omar's claims under AS 23.30.110(c). The board did not discuss the legal effect, if any, of the affidavit of readiness for hearing filed by Omar on August 14, 2003.

Discussion.

When reviewing appeals from board decisions, the commission makes its decision based upon the record made before the board, the transcript or recording of the board hearing, and the arguments and briefing of the parties.²⁶ The commission is bound by the credibility determinations made by the workers' compensation board.²⁷ If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings of fact, but the commission will exercise its independent judgment on questions of law and procedure.²⁸

The issue before us is whether the board properly applied the law, and had

²⁴ The board refers to the date of this controversy as June 11, 2003 in AWCB Dec. No. 06-0272 at 5. This is a typographical error. Unisea filed the controversy on June 11, 2002, as recognized earlier in the board decision. R. 0024.

²⁵ Omar filed an affidavit of readiness for hearing on May 16, 2002. The board rejected this affidavit as incomplete. R. 0653. It was not considered by the board.

²⁶ AS 23.30.128(a).

²⁷ AS 23.30.128(a). The board made no explicit findings regarding Omar's credibility.

²⁸ AS 23.30.128(b).

sufficient evidence to support its findings, when determining that Omar's claims for benefits were time-barred under AS 23.30.110(c). Omar argues that the board erred when it failed to consider his August 2003 affidavit of readiness for hearing.²⁹ Section 110(c) requires an employee to request a hearing within two years of the date an employer controverts a claim.³⁰ If an employer controverts a claim, and if the employee does not request a hearing for a period of two years following the date of controversion, the board must dismiss the claim. The burden on the employee is minimal. The only act required of the employee to prosecute their claim is to file a request for a hearing within two years of the date of a controversion and the board "may require no more of the employee."³¹

Omar raised the question of the effect of his August 2003 affidavit of readiness for hearing at the hearing on Unisea's petition to dismiss;³² yet, the board failed to make any findings related to the affidavit or decide whether the affidavit was a valid request for hearing.³³ A claimant has the right to have the board "fairly consider" evidence and arguments presented.³⁴ The board fell short of the legislature's direction to fairly consider the arguments and evidence presented when it did not evaluate Omar's August 2003 affidavit of readiness for hearing. When the board fails to make a necessary finding, the commission cannot bridge the gap by making its own

²⁹ Neither Omar nor Unisea contested the board's finding that a tolling period applied with respect to the time allowed to file an affidavit of readiness for hearing where an SIME has been ordered.

³⁰ *Tipton v. ARCO Alaska, Inc.*, 922 P.2d 910, 913 (Alaska 1996).

³¹ *Id.* at 913; *Huston v. Coho Electric*, 923 P.2d 818, 820 (Alaska 1996). The commission makes no determination as to whether the statutes and regulations governing worker's compensation proceedings allow for a tolling period as a form of equitable relief in this case. Here, neither party appealed the board's determination that a tolling period applied.

³² Hrg. Tr. 22-27.

³³ By way of comparison, the record clearly shows that the board rejected an earlier affidavit of readiness for hearing filed by Omar and communicated this fact to Omar at or about the time of its filing. R. 0653.

³⁴ AS 23.30.001(4).

determination from the record.³⁵ Therefore, the commission must remand to the board for further review and consideration.

On remand, we instruct the board to consider whether Omar's August 2003 affidavit of readiness for hearing was sufficient to constitute a valid request for a hearing. If the board determines that the August 2003 affidavit of readiness for hearing was a timely, valid request for a hearing, the board shall schedule a hearing on the merits of those of Omar's claims that are preserved by the August 2003 affidavit.

If the board determines that the August 2003 affidavit of readiness for hearing was not a valid request for a hearing, the board shall make specific findings whether the circumstances require dismissal of Omar's claims or whether some other action is appropriate. In engaging in this inquiry, the board shall give due attention to the effect of Mr. Gerke's communications to the parties with respect to the requirements and time bar of AS 23.30.110(c) as well as to Omar's AS 23.30.110(c) obligations and to any substantive deficiencies in Omar's August 2003 affidavit of readiness for hearing.³⁶ The board should evaluate the circumstances surrounding staff efforts made to communicate with Omar, whether Omar was self-represented, and whether Omar was instructed as to how any defects or errors could be remedied. For instance, did the board provide Omar with notice that it rejected the August 2003 affidavit of readiness for hearing and that the affidavit was not an acceptable document to satisfy the time limitations of AS 23.30.110(c)? Were any service defects cured by actual notice of the affidavit of readiness for hearing provided at the September 11, 2003 pre-hearing conference or later by service by mail? If so, does that notice have an impact on the

³⁵ *Bolieu v. Our Lady of Compassion Care Center*, 983 P.2d 1270, 1275 (Alaska 1999).

³⁶ *Bohlmann v. Alaska Constr. & Engineering, Inc.*, AWCAC Dec. No. 023, 9-10 (December 8, 2006); *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963); *Dwight v. Humana Hospital Alaska*, 876 P.2d 1114, 1120 (Alaska 1994); *Collins v. Arctic Builders*, 957 P.2d 980, 982 (Alaska 1998); *but cf.*, *Snyder v. American Legion Spenard Post No. 28*, 119 P.3d 996, 999 (Alaska 2005).

efficacy of the affidavit?³⁷ Do the circumstances as a whole constitute compliance with the requirements of AS 23.30.110(c) sufficient to excuse any failures by Omar to comply with the statute?

Conclusion and Order.

The board did not make findings with respect to Omar's August 14, 2003 affidavit of readiness for hearing. We VACATE the board's order to the extent it dismisses Omar's claims filed after August 13, 2001 and before July 26, 2003. Without suggesting whether the August 2003 affidavit is valid or invalid, we REMAND this case to the board to make additional findings and to determine if Omar's August 14, 2003 affidavit of readiness for hearing complied with the limitations period of AS 23.30.110(c) and the board's regulations. We express no opinion as to what the board's conclusions should be. Whatever the board's decision is, in order to provide a proper foundation for its decision and our subsequent review, the board shall include explicit statements regarding credibility of the witnesses as appropriate, a discussion of the pertinent facts, and its conclusions with respect to those facts. It is within the board's discretion to determine whether or not it wishes to re-open the record to take additional evidence regarding the August 14, 2003 affidavit of readiness for hearing.

Date: 27 August 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

John Giuchici, Appeals Commissioner

Signed

Kristin Knudsen, Chair

³⁷ Omar filed his affidavit of readiness for hearing on August 14, 2003. R. 0060. Unisea may not have received a copy of this affidavit before the September 11, 2003 pre-hearing conference; but Unisea clearly had notice that Omar had filed the document by September 18, 2003. R. 0099. The pre-hearing conference summary indicates the August 2003 affidavit of readiness for hearing was discussed. R. 0678.

APPEAL PROCEDURES

This is a final decision on this appeal, but it is not a final decision on the workers' compensation claim. The commission's decision returns the case to the board to make additional findings of fact, which may, or may not, result in a change in the board's decision. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Alaska Supreme Court review are instituted. Effective November 7, 2005, proceedings to appeal 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. However, because this is not a final administrative agency decision on the workers' compensation claim, the Supreme Court may not accept an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed 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).

If you wish to seek review by 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 appeals 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 this Decision and Order on appeal in the matter of *Mohamed D. Omar v. Unisea Inc. and Alaska National Insurance Company*, AWCAC Appeal No. 06-029; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 27th day of August, 2007.

Signed
R. M. Bauman, Appeals Commission Clerk

<u>Certificate of Distribution</u> I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No. 06-029 was mailed on <u>8/27/07</u> to: Mohammed Omar (certified) & Meshke, at their addresses of record and faxed to Meshke, Director WCD, AWCB Appeals Clerk. <u>Signed</u> <u>8/27/07</u> R. M. Bauman, Appeals Commission Clerk Date
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