

Alaska Workers' Compensation Appeals Commission

Trevor Millar,
Petitioner,

Memorandum Decision
on Order on Petition for Review

Decision No. 281 June 3, 2020

vs.

Young Life and ACE American Insurance
Company,
Respondents.

AWCAC Appeal No. 20-007
AWCB Decision No. 20-0016
AWCB Case No. 201307276

Order on Petition for Review of Alaska Workers' Compensation Board (Board) Interlocutory Decision and Order No. 20-0016, issued at Anchorage, Alaska, on March 23, 2020, by southcentral panel members Ronald P. Ringel, Chair, Bronson Frye, Member for Labor, and Sara Faulkner, Member for Industry.

Appearances: James C. Croft, The Croft Law Office, for petitioner, Trevor Millar; Vicki A. Paddock, Meshke Paddock & Budzinski, PC, for respondents, Young Life and ACE American Insurance Company.

Commission proceedings: Petition for review filed April 7, 2020; opposition to petition for review filed April 23, 2020.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Trevor Millar filed a claim for a compensation rate adjustment which was controverted by his former employer, Young Life, and its insurer, Ace American Insurance Company (Young Life).¹ Subsequently, Mr. Millar filed a petition for a protective order against releases Young Life sent, seeking his permission for *ex parte*

¹ *Millar v. Young Life*, Alaska Workers' Comp. Bd. Dec. No. 20-0016 (Mar. 23, 2020) at 2, Nos. 6-7 (*Millar*).

contact with his treating physicians.² After the hearing on the written record before the Alaska Workers' Compensation Board (Board) on February 6, 2020, the Board denied Mr. Millar's petition.³ Mr. Millar timely filed a petition for review with the Alaska Workers' Compensation Appeals Commission (Commission) on April 7, 2020. The Commission now grants the petition and reverses the Board's decision.

2. Factual background and proceedings.

Mr. Millar was an area director for Young Life. On June 8, 2013, Mr. Millar was mentoring two young men to become Young Life leaders, when he jumped onto an inner tube being towed behind a jet ski. The tow rope wrapped around his neck and he was pulled under water, suffering a crushed trachea.⁴

On June 25, 2013, Young Life filed a Controversion Notice denying all benefits on the basis Mr. Millar was not injured in the course and scope of his employment.⁵ On August 30, 2013, Mr. Millar filed a claim seeking a variety of benefits and alleging Young Life's controversion was unfair or frivolous. He explained his left carotid artery was torn, and he suffered a stroke as a result of the injury.⁶

On October 11, 2013, Young Life controverted Mr. Millar's claim, stating the injury did not occur in the course and scope of Mr. Millar's employment.⁷ However, Young Life, on November 13, 2013, rescinded the June 20 and October 11, 2013, controversions and began paying benefits.⁸

Mr. Millar, on August 30, 2019, filed a claim for a compensation rate adjustment and attorney fees and costs.⁹ Young Life, on September 24, 2019, controverted the

² *Millar* at 2, No. 8.

³ *Id.* at 1, 7.

⁴ *Id.* at 2, No. 1.

⁵ *Id.*, No. 2.

⁶ *Id.*, No. 3.

⁷ *Id.*, No. 4.

⁸ *Id.*, No. 5.

⁹ *Id.*, No. 6.

requested compensation rate adjustment and attorney fees and costs.¹⁰ Young Life sent Mr. Millar new releases which included the right to contact his treating physicians without his prior consent. Mr. Millar, on December 2, 2019, filed a petition seeking a protective order against these medical releases. In particular, he objected to the following language in the releases:

I consent and authorize you to respond in writing to written questions from the employer, adjuster, or MP&B. The employer, adjuster, and MP&B agree to contemporaneously copy my attorney with all questions sent to you and copy my attorney with responses within five days of receipt.¹¹

At the January 9, 2020, prehearing conference, the Board Designee denied Mr. Millar's petition for a protective order, relying on a prior Board decision in *Holt v. The Home Depot, Inc.*¹² Mr. Millar, on January 21, 2020, filed a petition seeking review of the Designee's discovery order.¹³ In his hearing brief, Mr. Millar contended the Board's *Holt I* decision was overruled in part by the Commission's decision in *The Home Depot, Inc. v. Holt*.¹⁴

3. Standard of review.

The Commission has implied authority to decide petitions for review of an interlocutory decision of the Board.¹⁵ The Commission's regulations provide the mechanism for reviewing such petitions:

(a) A party may petition or cross-petition the commission, as provided in 8 AAC 57.075, for review of an interlocutory or other non-final board decision or order that is not otherwise appealable under this chapter.

¹⁰ *Millar* at 2, No. 7.

¹¹ *Id.*, No. 8.

¹² *Holt v. The Home Depot, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0102 (Oct. 12, 2018) (*Holt I*); *Millar* at 3, No. 9.

¹³ *Millar* at 3, No. 10.

¹⁴ *The Home Depot, Inc. v. Holt*, Alaska Workers' Comp. App. Comm'n Dec. No. 261 (May 28, 2019) (*Holt II*); *Millar* at 3, No. 11.

¹⁵ *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 345-6 (Alaska 2011).

(b) Review will be granted only if the policy that appeals be taken only from final decisions and orders is outweighed because

(1) postponement of review until appeal may be taken from a final decision or order will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship, or other related factors;

(2) the decision or order involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the decision or order may materially advance the ultimate resolution of the claim;

(3) the board has so far departed from the accepted and usual course of proceedings as to call for the commission's review; or

(4) the issue is one that might otherwise evade review, and an immediate decision by the commission is needed for the guidance of the board.¹⁶

A decision on a petition for review is made without oral argument and will be rendered as soon as practicable.¹⁷

4. Discussion.

Mr. Millar, while working for Young Life as an Area Director, was injured when the tow rope on a jet ski wrapped around his neck. At the time of injury, he was mentoring two young men to become Young Life leaders. The injury crushed his trachea and he subsequently suffered a stroke. The combined effects have left him severely impaired. Initially, Young Life controverted his report of injury stating the injury did not occur within the course and scope of his employment with Young Life.

Mr. Millar filed a claim for benefits and Young Life again filed a controversion, renewing its assertion he was not injured in the course and scope of his employment. However, Young Life, in November 2013, rescinded the two controversions, accepted the claim, and began paying benefits.

In August 2019, Mr. Millar filed a claim for a compensation rate adjustment, which Young Life controverted on September 24, 2019. Following its controversion, Young Life sent Mr. Millar releases to be signed which contained the following:

¹⁶ 8 AAC 57.073.

¹⁷ 8 AAC 57.077.

I consent and authorize you to respond in writing to written questions from the employer, adjuster, or MP&B. The employer, adjuster, and MP&B agree to contemporaneously copy my attorney with all questions sent to you and copy my attorney with responses within five days of receipt.

Mr. Millar filed a request for a protective order and, at the prehearing conference on January 9, 2020, the Board Designee denied his request, relying on the Board decision in *Holt I*.¹⁸ Mr. Millar then asked the Board to review the Board Designee's decision, asserting *Holt I* was reversed in part by the Commission's decision in *Holt II*.¹⁹

The Board, in its decision, stated that although the Commission in *Holt II* stated that litigation began with the filing of a controversion, that decision did not apply in the case at hand because the controversion here was not of medical benefits. Since the controversion did not involve medical benefits, the Board opined that the Commission's decision in *Holt II* did not preclude an employer from *ex parte* contact with an employee's treating physician without advance notice to the employee.

The Commission, in *Holt II* reviewed the Alaska Supreme Court's (Court) decision in *Harrold-Jones* to ascertain if it applied to the workers' compensation process.²⁰ In *Harrold-Jones*, the Court discussed the effect of the federal legislation known as HIPAA on litigation.²¹ The Court reached the conclusion that "medical discovery should be conducted through the formal discovery rules rather than *ex parte* contact."²² The Court further noted that there was nothing in the record suggesting that an *ex parte* contact was "necessary for a just adjudication."²³

¹⁸ *Holt I*.

¹⁹ *Holt II*.

²⁰ *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018)(*Harrold-Jones*).

²¹ Health Insurance Portability and Accountability Act of 1966 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.) (*Harrold-Jones*, 422 P.3d at 577, fn. 9).

²² *Harrold-Jones*, 422 P.3d at 577.

²³ *Id.*

In the Commission's decision in *Holt II*, the Commission discussed the explicit exemption in HIPAA for workers' compensation matters. The Commission stated that the Court's strictures on *ex parte* communications by defense counsel in tort litigation did not apply in workers' compensation matters, unless and until an employer moved a case into the litigation process by filing "a controversion." The operative word is "a" because the employer holds the key to when and how a workers' compensation claim becomes litigious. Once an employer moves a claim into litigation it stays there until the matter is settled either through a hearing, settlement, or withdrawal of all controversions.

More importantly, the Commission, in *Holt II*, did not say the controversion had to relate to medical issues, although it did discuss the need prior to a controversion for an employer to be able, for a variety of reasons, to contact an employee's treating doctors. Once a controversion, any controversion, has been filed, the matter is now litigious. Therefore, prior notice to an employee before any *ex parte* communication, written or oral, is required before the *ex parte* communication may be made. An employer has a variety of options at its disposal if it feels the need to contact a treating physician once it has placed the case into litigation by filing a controversion.

Here, the Board surmised that the controversion placing a claim into the litigation process had to be a controversion of medical treatment. *Holt II* held that "a" controversion placed the matter into litigation. An employer determines when and how to controvert a claim and, thus, when to place a matter into litigation. Although, Mr. Millar's request was for a compensation rate adjustment and Young Life's controversion addressed only the compensation rate issue, Young Life still placed the matter into litigation. The question is raised of how or why does Young Life need essentially unfettered access to Mr. Millar's treating doctors in order to defend his claim for a compensation rate adjustment. Like the defendant in *Harrold-Jones*, Young Life did not provide evidence that an *ex parte* communication with Mr. Millar's doctors was necessary for it to achieve a just adjudication. A controversion, on any issue, places the matter into litigation and *ex parte* communication with a claimant's treating doctors may be made only with advance notice to the claimant. An employer may always

proffer reasons to the Board why no advance notice should be given and ask the Board for *ex parte* contact without advance notice.

The Board misunderstood the Commission's reasoning and rationale for the *Holt II* decision. The Commission did not indicate that "a" controversion placing the matter into litigation had to be related to medial issues. The decision is reversed and remanded to the Board to provide Mr. Millar with the requested protective order.

5. Conclusion and order.

The petition for review is GRANTED. It is ORDERED that the Board's decision is REVERSED and REMANDED for further action.

Date: 3 June 2020 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Amy M. Steele, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

This is not a final Commission decision or order on the merits of an appeal from a final Board decision or order on a claim. This is a non-final order of the Commission on the merits of a petition for review of a non-final Board decision. The effect of this order is to allow the Board to proceed toward a hearing on the merits of the employee's workers' compensation claim. The petitioner may still appeal a final Board decision when it is reached on the claim.

This order becomes effective when distributed (mailed) unless proceedings to seek supreme court review are instituted (started). For the date of distribution, see the box below.

PETITION FOR REVIEW

A party may file a petition for review of this order with the Alaska Supreme Court as provided by the Alaska Rules of Appellate Procedure (Appellate Rules). *See* AS 23.30.129(a) and Appellate Rules 401 – 403. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date of this order's distribution.

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to 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

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

RECONSIDERATION

The Alaska Supreme Court ruled in *Warnke-Green vs. Pro West Contractors, LLC*, 440 P.3d 283 (Alaska 2019), that "AS 23.30.128(f) does not prohibit the Commission from reconsidering orders other than the final decisions described in AS 23.30.128(e) because the authority to reconsider is necessarily incident to the Commission's express authority to 'issue other orders as appropriate.'"

A party may ask the Commission to reconsider this order by filing a motion for reconsideration no later than 10 days after the date shown in the notice of distribution (the box below). If a request for reconsideration of this order is filed on time with the Commission, any proceedings to petition for review to the Alaska Supreme Court must be instituted no later than 10 days after the reconsideration decision is distributed to the parties.

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Memorandum Decision No. 281 – Order on Petition for Review, issued in the matter of *Trevor Millar v. Young Life and ACE American Insurance Company*, AWCAC Appeal No. 20-007, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 3, 2020.

Date: September 11, 2020



Signed

K. Morrison, Appeals Commission Clerk