

Alaska Workers' Compensation Appeals Commission

Kamil Maalah,
Appellant,

vs.

Trident Seafoods and Liberty Insurance
Corporation,
Appellees.

Final Decision on Reconsideration

Decision No. 267 September 13, 2019

AWCAC Appeal No. 18-022
AWCB Decision No. 18-0106
AWCB Case No. 201514367

Final decision on reconsideration of Alaska Workers' Compensation Appeals Commission Final Decision No. 263, issued July 1, 2019, on the appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0106, issued at Anchorage, Alaska, on October 15, 2018, by southcentral panel members Henry Tashjian, Chair, Nancy Shaw, Member for Labor, and David Kester, Member for Industry.

Appearances: Kamil Maalah, self-represented appellant; Jeffrey D. Holloway, Babcock Holloway Caldwell & Stires, PC, for appellees, Trident Seafoods and Liberty Insurance Corporation.

Commission proceedings: Appeal filed November 26, 2018; briefing completed April 4, 2019; Final Decision No. 263 issued July 1, 2019; Appellees' Motion for Partial Reconsideration filed July 31, 2019; Order on Appellees' Motion for Partial Reconsideration issued August 21, 2019.

Commissioners: Michael J. Notar, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

On July 1, 2019, the Alaska Workers' Compensation Appeals Commission (Commission) issued Final Decision No. 263, reversing the Alaska Workers' Compensation Board's (Board) decision¹ denying Mr. Maalah medical benefits and PPI for the

¹ *Maalah v. Trident Seafoods*, Alaska Workers' Comp. Bd. Dec. No. 18-0106 (Oct. 15, 2018).

hearing loss and ear infection, affirming the Board's decision denying Mr. Maalah TTD and PTD benefits, and remanding to the Board for action consistent with the decision.

On July 31, 2019, appellees, Trident Seafoods and Liberty Insurance Corporation (Trident) filed a motion for partial reconsideration, requesting that the Commission reconsider its

reversal of the Board's decision denying appellant medical benefits and PPI for the ear infection injury on the following grounds:

1. The commission overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling; and
2. The commission overlooked or misconceived a material fact.

On August 21, 2019, the Commission granted partial reconsideration of "the issue of whether the report of Dr. Rockwell is sufficient evidence to overcome the presumption of compensability, based on the record before the Commission and without any additional briefing by the parties."

2. Standard of review.

AS 23.30.128(e) and (f) state:

(e) Within 90 days after written briefing on the appeal is completed or oral argument is held, whichever is later, the commission shall issue a decision in writing. The decision must contain a concise statement of reasons for the decision, including findings of fact, if required, and conclusions of law. The commission shall serve each party and the director with a copy of the decision. Appeals may be expedited for good cause by the commission. Unless reconsideration is ordered under (f) of this section, a decision under this subsection is the final commission decision.

(f) A party or the director may request reconsideration of a decision issued under (e) of this section within 30 days after the date of service shown in the certificate of service of the decision. The request must state specific grounds for reconsideration. Reconsideration may be granted if, in reaching the decision, the commission (1) overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling; (2) overlooked or misconceived a material fact; (3) misconceived a material question in the case; or (4) applied law in the ruling that has subsequently changed. The panel of the commission hearing the request for reconsideration shall consist of the same members of the

panel that issued the decision. The commission may issue an order for reconsideration of all or part of the decision upon request of a party or the director. Reconsideration is based on the record, unless the commission allows additional argument. The power to order reconsideration expires 60 days after the date of service, as shown on the certificate of service, of reconsideration is ordered, the commission shall issue a decision within 30 days after the close of the record on reconsideration. The commission shall serve each party in the case with a copy of the decision upon reconsideration. The decision upon reconsideration is the final commission decision.

The Commission's regulation regarding reconsideration 8 AAC 57.230, states:

(a) A party may request reconsideration of a final commission decision by filing a motion, supported by an affidavit or other evidence of the specific grounds for reconsideration, as provided in AS 23.30.128(f).

(b) Oppositions to requests for reconsideration are not permitted unless requested by the chair.

3. Discussion.

Trident filed for partial reconsideration asserting the Commission "overlooked, misapplied, or failed to consider a statute, regulation, court or administrative decision, or legal principle directly controlling" and "overlooked or misconceived a material fact." Specifically, Trident asserted the Commission erred in finding that the report of Dr. Rockwell did not overcome the presumption of compensability as to the otitis externa or ear infection. Trident further asked for reinstatement of the original Board order. The Commission granted partial reconsideration of the issue of whether the report of James Rockwell, M.D., is substantial evidence to rebut the presumption of compensability, based on the record before the Commission and without any additional briefing by the parties.

The Commission has now reconsidered its original decision and now modifies that decision. The Commission finds that as to the otitis externa or ear infection the EME report by Dr. Rockwell stating that he found no evidence of otitis externa at the time of his examination is sufficient to rebut the presumption of compensability for ongoing medical treatment for that condition alone. Dr. Rockwell did agree that the condition was likely chronic due to inadequate treatment, including failure by Mr. Maalah to follow the recommended treatment procedures. Dr. Rockwell did not deny that the condition arose while Mr. Maalah was working for Trident nor did he provide an alternative explanation

for the cause of the otitis externa. Therefore, his report rebuts the presumption of compensability for ongoing medical treatment. It does not rebut the presumption of compensability that the cause of the development of otitis externa was the work with Trident, since he did not provide an alternative explanation and did not rule out work as the cause of the condition. Dr. Rockwell did agree the otitis externa had likely become chronic.

Since Trident was able to rebut the presumption of compensability as to ongoing medical treatment for the otitis externa, Mr. Maalah needs to prove his claim for ongoing medical treatment by a preponderance of the evidence. On remand, the Board should weigh the medical records including those for Mr. Maalah's subsequent treatment for new outbreaks of the otitis externa. The Board, pursuant to *Morrison v. Alaska Interstate Construction, Inc.*,² needs to determine if the work at Trident is the substantial cause for the ongoing medical treatment related to the continuing development of symptoms of otitis externa. Among the medicals to be weighed is that for the appointment with Paul Henry Bikhazi, M.D., on July 19, 2017, who noted improvement at the current time, and also remarked that Mr. Maalah's condition was likely to increase or decrease. Another medical is the visit on November 14, 2017, with Jay Tal Rubinstein, M.D., who diagnosed chronic diffuse otitis externa of both ears. He did not opine a cause for the condition.

In all other respects the original decision in this matter by the Commission is not modified.

4. Conclusion and order.

It is hereby ORDERED that Decision No. 263 is MODIFIED to reflect that Trident did rebut the presumption of compensability as to the need for ongoing medical treatment

² *Morrison v. Alaska Interstate Constr., Inc.*, 440 P.3d 224 (Alaska 2019)(*Morrison*).

of the otitis externa. The matter is hereby REMANDED to the Board for actions consistent with Decision No. 263 and this modification.

Date: 13 September 2019 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Michael J. Notar, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner *pro tempore*

Signed

Deirdre D. Ford, Chair

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).

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 on Reconsideration No. 267, issued in the matter of *Kamil Maalah vs. Trident Seafoods and Liberty Insurance Corporation*, AWCAC Appeal No. 18-022, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 13, 2019.

Date: September 19, 2019



Signed

K. Morrison, Appeals Commission Clerk