

Alaska Workers' Compensation Appeals Commission

Emmet Hearon,
Appellant,

vs.

Westaff USA, Inc. and Travelers Ins.
Co.,
Appellees.

Memorandum Decision and Order

Decision No. 107 May 6, 2009

AWCAC Appeal No. 09-001

AWCB Decision Nos. 08-0228 & 08-0252

AWCB Case No. 200612194

Motion to Accept Late-Filed Appeal from Alaska Workers' Compensation Board Decision No. 08-0228, issued November 19, 2008, by southcentral panel members Howard A. Hansen, Member for Labor, and Linda Hutchings, Member for Industry, Linda Cerro, Chair, dissenting, and, on reconsideration, Decision No. 08-0252, issued December 16, 2008, by southcentral panel members Howard A. Hansen, Member for Labor, and Linda Hutchings, Member for Industry, Linda Cerro, Chair, dissenting.

Appearances: Emmet Hearon, pro se, appellant. Krista M. Schwarting, Griffin and Smith, for appellees Westaff USA, Inc. and Travelers Ins. Co.

Commission proceedings: Appeal, Motion to Accept Late-Filed Appeal, and Motion to Waive Filing Fee with Financial Statement Affidavit filed January 20, 2009. Non-opposition to Motion to Waive Filing Fee, Opposition to Notice of Appeal, Opposition to Accept Late-Filed Appeal with exhibits filed by appellees January 27, 2009. Objection to Appellant's Designation of Record and Motion to Dismiss Appeal filed February 3, 2009.

Commissioners: Stephen T. Hagedorn, David W. Richards, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The commission heard appellant's motion to accept a late-filed appeal on April 17, 2009. Appellant was present and represented himself. Appellees were represented by attorney Krista Schwarting. Appellant offered his own statements in

support of his request to accept a late-filed appeal, but declined the opportunity to testify.

Appellant argues that he was prevented from filing on time by unusual weather and that he made a good faith effort to file his appeal and serve the opposing party with his appeal as quickly as possible. Appellees opposed the notice of appeal and moved to dismiss the appeal, because it was incomplete and appellant failed to timely file additional material as instructed.¹ Although they concede they suffered no prejudice and the delay is short, they argue that appellant has a long-established pattern of not filing on time or correctly and that he should not be allowed to continue to ignore the statutes and regulations. They note that, after filing his notice of appeal late, he failed to file additional documents as instructed by the commission in a timely fashion.

1. Evidence presented to the commission.

The board's final decision and order on reconsideration was issued December 16, 2008, a Tuesday. The clerk's certificate on the decision states it was "dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, on December 16, 2008." Appellee's exhibit 1, a copy of the envelope in which the decision was mailed by the Workers' Compensation Division to Mr. Hearon, shows the envelope was postmarked December 17, 2008. The Notice of Appeal is dated January 14, 2009. The certificate of service shows a copy was mailed to the opposing party on January 18, 2009. The notice of appeal was received and filed in the commission office on Tuesday, January 20, 2009. The motion to accept a late-filed appeal was dated January 17, 2009. It also contains a certificate of service showing mailing on January 18, 2009. It was filed in the commission office on January 20, 2009.

Appellant stated that there was a significant Chinook storm on January 15 or 16 that caused bus service to be suspended and schools to close. He said he was planning to file the appeal the day he signed the appeal. He said he was not even able to get

¹ The motion to dismiss the appeal was not argued at the hearing and will be addressed in a separate order.

out of his parking lot or driveway. He said he wasn't able to leave until Saturday, when he went to the post office and sent the appeal by priority mail to the commission and to the opposing party's lawyer. No evidence was presented in opposition to the appellant's statements regarding the weather or his inability to leave his home due to the slick roads and the condition of his parking area and driveway. He said that when he was able to get to the post office, he spent the extra money for priority mail to make sure that his appeal was received as soon as possible.

2. Discussion.

The commission considers a motion to accept a late-filed appeal to be in the nature of a motion to dismiss the appeal for failure to prosecute, because the first duty of the appellant is to file an appeal within the time proscribed by statute. A hearing on a motion to accept a late-filed appeal is one of the few occasions when the commission may take evidence and determine the credibility of evidence offered.² The commission makes findings of fact based on evidence that a reasonable mind could accept as sufficient to support the finding. There is no statutory presumption that an appeal is filed on time, so the appellant must produce sufficient evidence to persuade the commission by a preponderance of the evidence that he should be excused from compliance with the statute and his appeal accepted.

a. Findings of fact.

The commission finds the board's decision was filed in the board's office on December 16, 2008. Based on appellees' exhibit 1, the commission finds the board's decision was not mailed to the parties until the following day, December 17, 2008. The commission finds the appeal was filed in the commission on January 20, 2009, the day it was received. The commission finds that January 20, 2009, was a Tuesday. The preceding Monday, January 19, 2009, was a legal holiday, Martin Luther King Day. January 18, 2009, was a Sunday. January 14, 2009, was a Wednesday.

The commission finds that a Chinook storm beginning Wednesday, January 14, 2009, disrupted traffic and closed schools in Anchorage. Streets were slick and there

² AS 23.30.128(c).

was freezing rain on melting ice for several days. The commission accepts appellant's statement that he was unable to leave his home due to the road conditions and his own parking area and driveway, based on his assurance to the commission that he was speaking the truth. The commission therefore accepts that appellant was unable to deliver or mail the notice of appeal on January 14, 2009, or January 15, 2009.

The commission finds that thirty days after December 16, 2008, was Thursday, January 15, 2009, and that thirty days after December 17, 2008, was Friday, January 16, 2009. The commission finds the appellant believed his appeal was late by Saturday, January 17, 2009, when he dated the motion to accept a late-filed appeal.

b. Conclusions of law.

AS 23.30.127 provides in pertinent part:

Appeals to the commission. (a) A party in interest may appeal a compensation order issued by the board to the commission within 30 days after the compensation order is filed with the office of the board under AS 23.30.110. The director may intervene in an appeal. If a party in interest is not represented by counsel and the compensation order concerns an unsettled question of law, the director may file an appeal to obtain a ruling on the question by the commission.

(b) An appeal is initiated by filing with the office of the commission

- (1) a signed notice of appeal specifying the compensation order appealed from;
- (2) a statement of the grounds upon which the appeal is taken; and
- (3) other material the commission may by regulation require.

The commission found that the final decision on reconsideration in appellant's case, the "compensation order" he appeals, was "filed with the office of the board" on December 16, 2008. Ordinarily, copies of the decision are mailed to the parties when the decision is filed in the office of the board, in accordance with AS 23.30.110(e).³

³ AS 23.30.110(e) provides:

Following the board's instructions on appeal procedure at the end of the decision would lead the reader to conclude the appeal was due no later than January 15, 2009.

In this case, however, the board failed to file and mail the board's order on the same day. In the event that the board fails to mail a copy of its decision and order on the same day it files the decision and order in its office, the commission considers the act of "fil[ing] with the office of the board under AS 23.30.110" is incomplete. The process of filing the decision under AS 23.30.110(e) is not complete until the board deposits a copy in the mail, in an envelope addressed to the parties at their "last known address." Therefore, the commission concludes the appellant's notice of appeal could have been timely filed as late as Friday, January 16, 2009.⁴ However, this would not have been obvious to appellant, who would have been guided by the language describing the appeal procedures at the end of the decision.

Appellant said he went to the post office on Saturday, but he also said that he mailed the opposing party a copy of the notice of appeal on January 18, 2009, which was a Sunday. The motion to accept a late filed appeal was dated January 17, 2009, a Saturday. It is possible that appellant had his dates confused, or that he believed that his appeal was due in the commission office on January 15, 2009. In any event, owing to the intervention of a three-day holiday weekend, the appeal notice arrived in the office of the commission on the next working day after it was due.

In a number of decisions, the commission has held that it will *excuse* late filing of an appeal when good cause is presented for the delay.⁵ In those cases, the

(e) The order rejecting the claim or making the award, referred to in this chapter as a compensation order, shall be filed in the office of the board, and a copy of it shall be sent by registered mail to the claimant and to the employer at the last known address of each.

⁴ See *Gauthier v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 052, 4 (Aug. 24, 2007) ("the reference to AS 23.30.110 in AS 23.30.127(a) incorporates the condition that the board mails the decision to the appellant when the board decision is filed in the office of the board.").

⁵ *Olekszyk v. Smyth Moving Service, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 079, 4 (May 28, 2008); *Augustyniak v. Carr Gottstein Foods*, Alaska

commission looked to whether the appellant presented evidence of circumstances that justify equitable relief: if the delay was due to a circumstance outside the appellant's control, or the appellant was prevented from filing on time, if the appellant made a good faith attempt to file on time, the length of the delay, and the prejudice to the opposing party.

In *Shea v. State, Dep't of Admin.*, 204 P.3d 123, Slip Op. No. 6358 (Alaska 2009), the Supreme Court held the superior court abused its discretion by failing to excuse a six day delay in filing an administrative appeal when the appellant's attorney (1) attempted to file the appeal on Wednesday, June 20 (the last day of the appeal period), but the clerk erroneously directed the appellant to file at the workers' compensation board; (2) attempted to file again on Thursday, June 21, but was refused by the clerk owing to a caption issue and lack of a cost bond; and, (3) was unable to file on Monday, June 25 because he was stranded in Valdez until after the court closed. He finally filed the appeal on Tuesday, June 26.

Appellate Rule 502(b) permits the appellate court to validate an act done after the expiration of the time period provided in the appellate rules "on motion of a party, showing good cause." The Supreme Court held Shea's attorney demonstrated good cause, given the brevity of the delay, the "prima facie showing of good faith attempts to file in a timely manner, and the absence of prejudice."⁶ No provision equivalent to Appellant Rule 502(b) exists in AS 23.30.127(a). The commission's regulation on extensions of time, 8 AAC 57.140, does not authorize the commission to extend deadlines established by statute.⁷ Because the commission lacks explicit statutory authority to waive the deadline established by the legislature, the commission has held

Workers' Comp. App. Comm'n Dec. No. 064, 12 (Nov. 28, 2007); *Gauthier v. State, Div. of Workers' Comp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 052, 5 (Aug. 24, 2007); *Berean v. Coleman Bros. Logging Co.*, Alaska Workers' Comp. App. Comm'n Dec. No. 051, 5 (Aug. 2, 2007).

⁶ *Shea*, Slip Op. No. 6358 at 13.

⁷ See *Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227, 1229 (Alaska 2003) (holding board's regulation 8 Alaska Admin. Code 45.195 gave board no authority to waive a statutory requirement).

that the exercise of any implied equitable authority should be limited to cases where the appellant was prevented from filing on time under circumstances recognized by the courts as allowing administrative agencies to exercise equitable powers in like cases.⁸

The Supreme Court's recent decision in *Bohlmann v. Alaska Constr. & Engineering, Inc.*,⁹ does not require otherwise. In *Bohlmann*, the Supreme Court held that the board and commission erred in concluding that Bohlmann's affidavit of readiness was late because, in view of misinformation stated by the employer in a prehearing conference, the division's workers' compensation officer "should have told Bohlmann in more than general terms how he might still preserve the claim, or at least specifically how Bohlmann could determine whether AC&E was correct in contending that the claim was already barred."¹⁰ Because the board found that Bohlmann had shown he was capable of filing claims and petitions without counsel, the Court presumed that "Bohlmann would have filed a timely affidavit of readiness had the board or staff satisfied its duty to him."¹¹ Therefore, the appropriate remedy was to deem the request for hearing timely. In other words, if Bohlmann had not been prevented from filing by the employer's misinformation, and the officer's failure to correct the misinformation, Bohlmann would have filed on time.

The commission found that appellant's appeal was filed on the first working day after it was due. Appellant's delay in filing his appeal is minimal. Appellees concede there was no prejudice to them. Appellant's excuse, that he was unable to leave his home due to the local effect of the Chinook storm that caused interruptions in bus service and school closures, correctly focuses on why he was *prevented* from filing an appeal on time by something outside his control. Although the commission staff

⁸ *Berean*, App. Comm'n Dec. No. 051 at 5. *See also Chalovich v. State, Dep't of Nat. Res.*, 104 P.3d 125 (Alaska 2004) (holding mining statute requiring fee payment or performance of annual labor by Sept. 1, 2004, requires strict compliance, but Dep't unreasonably failed to treat as timely a payment postmarked by the regulatory deadline).

⁹ ____ P.3d ____, Slip Op. No. 6362 (Alaska 2009).

¹⁰ *Id.*, Slip Op. No. 6362 at 9.

¹¹ *Id.* at 11.

managed to get to work and keep the office open during the storm, the commission is aware that the storm's effects were worse in some areas than others. No evidence was offered to contradict appellant's assertion that he was unable to leave his home on January 14 and 15, 2009. Even if he were able to leave home by Friday, January 16, 2009, appellant could not have known that an appeal filed on Friday would have been timely. The commission therefore excuses the one-day late filing of appellant's appeal based on his statement that he was unable to leave his home due to the storm's effects until Saturday, January 17, 2009.

The commission cautions appellant that his appeal may be dismissed if he fails to prosecute his appeal or to comply with commission orders.

ORDER

The commission ORDERS that the late filing of appellant's appeal is excused and the notice of appeal is accepted.

Date: May 6, 2009

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

David W. Richards, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final decision on the merits of this appeal. The effect of this decision is to allow the appeal filed by Emmet Hearon to continue in the appeals commission.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the service 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. Because this is not a final commission decision on an appeal of a final board order on a claim, the Supreme Court might not accept an appeal.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you

believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) 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

This is not a decision issued under AS 23.30.127(e) as the final decision on appeal, so reconsideration is not available.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Memorandum Decision No. 107 on Motion to Accept Late-Filed Appeal in AWCAC Appeal No.09-001, *Emmet Hearon v. Westaff USA, Inc.*, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 6th day of May, 2009.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION
I certify that on 5-6-09 a copy of this Memorandum Decision No. 107 in AWCAC Appeal No. 09-001 was mailed to: E. Hearon (certified) and K. Schwarting at their addresses of record and faxed to K. Schwarting, AWCB Appeals Clerk, and the Director WCD.
Signed
B. Ward, Deputy Appeals Commission Clerk