

## Alaska Workers' Compensation Appeals Commission

Mark C. Berean,  
Appellant,

vs.

Coleman Brothers Timber Cutting, Inc.  
and Liberty Northwest Insurance  
Company,  
Appellees.

### Final Decision and Order

Decision No. 051 August 2, 2007

AWCAC Appeal No. 07-026

AWCB Decision No. 07-0087

AWCB Case No. 200615265

Appeal from Alaska Workers' Compensation Board Decision No. 07-0087 issued April 17, 2007, by the southcentral panel at Anchorage, Rosemary Foster, Designated Chair, and Patricia A. Vollendorf, Member.

Appearances: Mark C. Berean, *pro se*, appellant. Jeffery D. Holloway, Holmes, Weddle & Barcott, for appellees Coleman Brothers Timber Cutting, Inc. and Liberty Northwest Insurance Company.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

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

By: Jim Robison, Appeals Commissioner.

This appeal concerns whether Mark C. Berean timely filed an appeal with the Alaska Workers' Compensation Appeals Commission after the Alaska Workers' Compensation Board dismissed his claim due to his refusal to comply with a discovery order issued by the board. The board issued its decision dismissing Berean's claim on April 17, 2007. Berean filed a notice of appeal on June 11, 2007.

### *Factual background.*

On April 17, 2007, the board dismissed Berean's claim for benefits. The board found that Berean willfully refused to comply with orders of the board's designee and refused to participate in the investigation of his claim.<sup>1</sup> Berean's failures included refusing to attend depositions, to participate in an independent medical evaluation, and

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<sup>1</sup> *Mark C. Berean v. Coleman Bros. Timber Cutting, Inc.*, AWCB Dec. No. 07-0087, 8 (April 17, 2007).

to sign releases.<sup>2</sup> Despite being provided many opportunities to participate in the investigation of his claim and in the proceedings of the board, and after being advised of the consequences of failing to participate, the board found that Berean's failures were egregious and that no lesser sanction than dismissal would adequately protect the employer's interest and deter other discovery violations.<sup>3</sup> The board's decision stated that it was a final decision.<sup>4</sup> The board informed Berean that his appeal must be filed with the commission within 30 days of the filing of its decision.<sup>5</sup> Thus, if Berean wanted to file a timely appeal, he was required to file the appeal by the close of business on Thursday, May 17, 2007.

On June 11, 2007, Berean filed a notice of appeal with the commission. This notice of appeal was accompanied by a Motion/Request by Pro Se Litigant to accept his appeal as a late-filed appeal, also filed on June 11. Berean's motion asked the commission to allow him to file his appeal 25 days late because: "I Mark C. Berean was treated as garbage, intimidated [and] overwhelmed." On June 18, 2007, the employer filed a combined opposition to Berean's motion to accept his late-filed appeal and a cross-motion to dismiss the appeal as untimely.

On June 26, 2007, the commission conducted a hearing to take evidence as to whether or not Berean's appeal should be dismissed. Berean represented himself at the hearing and the employer was represented by counsel. At the hearing, Berean admitted that he received help from the commission regarding the filing of his appeal. Berean also telephoned the commission several times before his appeal was due. The commission's deputy clerk urged Berean to come to the office to file his appeal on time and offered to assist him in filing the forms. Berean acknowledged that the forms to file an appeal were easy to understand and short, with the possible exception of the Financial Statement Affidavit.

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<sup>2</sup> AWCB Dec. No. 07-0087 at 7-8.

<sup>3</sup> AWCB Dec. No. 07-0087 at 8.

<sup>4</sup> AWCB Dec. No. 07-0087 at 9.

<sup>5</sup> *Id.*

Berean also spoke to at least three lawyers experienced in workers' compensation law before he came to the commission. He said they told him to file an appeal within 30 days. Despite questioning from the commission members, Berean was unable or refused to articulate any reason which *prevented* him from filing an appeal on time. He instead argued that his case was so important, that the employer's conduct so heinous and the injustice of the board's decision so great, the commission should allow the appeal to go forward. Although he provided testimony regarding his educational background and limited writing abilities, he also conceded that he fully understood that he needed to file his appeal within 30 days of the board's decision. He asserts that the commission should make an exception in his case because of the egregious conduct of the employer and of the deceitful treatment he received from the insurer in the past.

*Analysis.*

The issue presented for the commission is whether it should accept Berean's late-filed appeal. The Alaska Statutes allow a party 30 days to file an appeal of a board decision to the commission.<sup>6</sup> The appeal process is initiated by the party filing a signed notice of appeal, a statement of the grounds upon which the appeal is taken, and other material that the commission may require.<sup>7</sup> Berean did not file a notice of appeal to the commission until 55 days after the board issued its decision, 25 days late. He asks the commission to relax the filing deadline as applied to him.

The legislature enacted the 30-day appeal deadline to ensure that there is an adequate time for persons to consider and file an appeal. The appeal deadline is balanced by the corresponding need of all parties for finality to board decisions. Finality of decisions is a weighty consideration in the workers' compensation system where the legislature has reflected its desire to create a quick and efficient system to resolve claims.<sup>8</sup>

The 30-day deadline serves the interests of both employees and employers.

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<sup>6</sup> AS 23.30.127(a).

<sup>7</sup> AS 23.30.127(b).

<sup>8</sup> *See*, AS 23.30.001.

After 30 days, both employers and employees have some assurance that the decision of the board below is something they can rely on, absent grounds for modification under AS 23.30.130. An employee, for example, need not fear that benefits awarded by the board will be jeopardized months after a board decision because an employer re-thinks its position and decides to appeal. Injured employees need the certainty an award will be unchanged, or more difficult to change, that comes with finality.<sup>9</sup> Employers also need to be able to rely upon board decisions after a reasonable appeal period in order to make business decisions with knowledge of their costs.<sup>10</sup> Many of the same reasons for enforcing the time-bar in AS 23.30.110(c) apply to the time limit for filing an appeal to the commission.<sup>11</sup>

The commission has the authority to carry out its powers expressly granted to it, or implied as necessarily incident to the exercise of the powers granted in AS 23.30.<sup>12</sup>

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<sup>9</sup> *Underwater Const., Inc. v. Shirley*, 884 P.2d 156 (Alaska 1994).

<sup>10</sup> The commission is familiar with the principal, long recognized in labor law, that "finality is an important consideration in review of arbitrator's decisions." *Patterson v. State, Dep't of Agriculture*, 880 P.2d 1038, 1046, 148 L.R.R.M. 2611, 2617 (Alaska 1994), quoting *State v. Pub. Safety Employees' Ass'n*, 798 P.2d 1281, 1285 n. 7 (Alaska 1990). While a workers' compensation hearing is not an arbitration of a grievance, the workers' compensation system has some features of industrial self-government, including (1) the right to workers' compensation and the hearing process is a part of the contract of hire, AS 23.30.020; (2) labor and management representatives participate in the process of adjudication, AS 23.30.005(a), .007(b); and, proceedings at the board level are intended to be as quick and simple as possible while affording due process, AS 23.30.001(4), .005(h). Avoiding turmoil on the shop floor is not as important in workers' compensation cases, but the certainty of an available remedy for injury, regardless of fault, *is* a crucial benefit of the workers' compensation system. Part of that certainty is lost if the board's decision can be appealed beyond the deadline set by statute.

<sup>11</sup> See, e.g., *Bohlmann v. Alaska Constr. and Engineering, Inc.*, AWCAC Dec. No. 023, 14 (December 8, 2006).

<sup>12</sup> The commission is "an administrative agency created by statute and as such has no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted" by the legislature. *Gunter v. Kathy-O-Estates*, 87 P.3d 65, 69 n. 11 (Alaska 2004), citing *Blanas v. Brower Co.*, 938 P.2d 1056, 1061 (Alaska 1997), (quoting *Greater Anchorage Area Borough v. City of*

The filing deadline for appeal to the commission is set by statute, not commission rule. We have no express grant of authority to excuse non-compliance with the statute. We believe the exercise of any implied equitable authority should be limited to cases where the appellant was prevented by filing on time under circumstances recognized by the courts as allowing administrative agencies to exercise equitable powers in like cases.<sup>13</sup> We do not find those limited circumstances exist in this case.

Even if we had authority to extend this deadline, the commission finds that Berean has not presented evidence demonstrating good cause for his delay. Instead, his own statements show that Berean knowingly waited until the fifty-fifth day after the appeal deadline to file his notice of appeal.

As Berean was not represented, the commission actively sought a basis, perhaps unexpressed by Berean, for any cause as to why Berean did not timely file his appeal. Even upon inquiry by the commission, Berean provided no inkling of any circumstance that prevented him from filing his appeal on time. Neither Berean nor a family member was either sick or incapacitated or required medical assistance during the appeal period or thereafter. Berean was not on active military duty nor was he otherwise unavoidably drawn away from home. Berean admits that he knew about the deadline and that the commission staff attempted to assist him with filing his appeal.<sup>14</sup> Berean was not

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*Anchorage*, 504 P.2d 1027, 1033 n. 19 (Alaska 1972)). *But see*, AS 23.30.008(e) giving the commission power, in its administrative capacity, to “do all things necessary, convenient, or desirable to carry out the powers expressly granted or necessarily implied in this chapter.”

<sup>13</sup> See, e.g., *Tonoian v. Pinkerton Security*, AWCAC Dec. No. 029, 11 (January 30, 2007); *Morgan v. Alaska Regional Hospital*, AWCAC Dec. No. 035, 17 (February 28, 2007); *Kim v. Alyeska Seafoods, Inc.* AWCAC Dec. No. 042, 16 (May 22, 2007).

<sup>14</sup> Alaska Supreme Court has recognized, where litigants make a good faith effort to comply with the court’s rules, it may be appropriate to relax those rules. *Noey v. Bledsoe*, 978 P.2d 1264, 1270 (Alaska 1999) (a *pro se* party who makes good faith effort to comply should not be held to strict procedural safeguards). There is no evidence here of good faith on Berean’s part, especially where the commission informed Berean of the requirement and assisted him with compliance. Litigants are not excused

afflicted by a serious mental disorder. Instead, Berean urges the commission to accept his late-filed appeal because the conduct of his employer was heinous and egregious, the insurance company has a lawyer, and he just became frustrated.

The commission has specific authority for it to alter deadlines set by regulation. The commission may alter time periods that differ from the time periods established otherwise by regulation where strict adherence to time periods would work an injustice, where the change would assist in facilitating the business of the commission, or where an extension would advance the prompt, fair, and just dispositions of appeals.<sup>15</sup> Even so, this authority is limited to altering time periods set by *regulation*, not time periods set by *statute*.<sup>16</sup> The time for filing an appeal to the commission is set by statute. Putting aside that distinction between relaxing a time-bar required by regulation or statute, this authority would not aid Berean's cause. Even if the commission applied its authority granted by 8 AAC 57.270 to relax a deadline in this circumstance, there is no evidence here that adherence to the time requirement would work an injustice to Berean. Berean testified that he was aware of the deadline for filing his appeal, that he was provided assistance by the commission to meet that deadline, and that he made a conscious decision not to abide by the laws governing the commission's work. Relaxing a filing deadline under these circumstances does not present questions of a manifest injustice. It would not promote the prompt and fair dispositions of appeals.

*Conclusion.*

Berean did not present good cause to extend the appeal deadline. While a 25-day delay is not a long delay, Berean presented no evidence to support any reason or

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from making good faith efforts to assert their rights. *Id.*, citing *Wright v. Black*, 856 P.2d 477, 480 (Alaska 1993).

<sup>15</sup> 8 AAC 57.270.

<sup>16</sup> *Crawford & Co. v. Baker-Withrow*, 73 P.3d 1227, 1229 (Alaska 2003) (holding board's regulation 8 AAC 45.195 gave board no authority to waive a statutory requirement); compare, *London v. Fairbanks Municipal Utilities Emp. Group*, 473 P.2d 639, 642 (Alaska 1970) ("Where . . . the statutory mandate is clear . . . it is improper for the Workmen's Compensation Board to inject its own views on the policies underlying the Workmen's Compensation Act by imposing additional restrictions on the statutory language.").

good cause for his failure to timely file his appeal. Instead, the facts demonstrate that Berean squandered his time for appeal despite repeated advice not to delay. We therefore find that Berean filed this appeal late because he chose to do so. Therefore, the Commission DISMISSES Berean's appeal, AWCAC Appeal No. 07-026.

Date: August 2, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

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Jim Robison, Appeals Commissioner

*Signed*

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Stephen T. Hagedorn, Appeals Commissioner

Kristin Knudsen, Chair, concurring.

I concur in my fellow appeals commissioners' decision to dismiss this appeal, but I write separately to explain my reasons for agreeing in the result.

The commission was created by the legislature to review decisions of the board and to produce the final administrative decision on a workers' compensation claim. Our responsibility is to ensure that all parties, represented or not, have a fair opportunity to present their appeals, to explain the commission's procedure to all parties, to assist unrepresented appellants and appellees without impairing the impartiality of the commission, and to provide those unrepresented persons who file defective appeals or pleadings the opportunity to correct them. Just as courts have the power to extend deadlines imposed by court rule, we have the power to extend deadlines imposed by our regulations under certain circumstances.

Statutory deadlines are another matter. The Supreme Court held long ago that failure to comply with the statutory appeal deadline in the Administrative Procedures Act, AS 44.64.560(a), providing that appeal to the superior court of a final administrative order must be filed within 30 days, was not a jurisdictional defect.<sup>17</sup> But, the Court did not suggest that *any* statutory appeal deadline may be ignored. The

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<sup>17</sup> *McCarrey v. Comm'r of Natural Res.*, 526 P.2d 1353, 1355 (Alaska 1974).

Court reasoned that the 30-day appeal period was adopted by court rule *after* the statute was enacted, and the court rule thus superseded the statutory rule. Thus, because the court has authority to relax its rules to “aid its appellate jurisdiction,” it may extend the time provided by those rules to file an appeal from an administrative order, notwithstanding the statute.

The legislature, not this commission, established the time for filing an appeal to the commission in AS 23.30.127(a). It did not expressly authorize the commission to excuse failure to comply. However, the legislature granted the commission the power to “make other rules and orders to facilitate the business of the commission and advance the prompt, fair, and just disposition of appeals.”<sup>18</sup> It gave the commission authority to hold hearings and receive evidence on motions to dismiss appeals for failure to prosecute.<sup>19</sup> In my view, taken together, the legislative grants of authority to make other orders for the “just disposition” of appeals and to “receive evidence” on motions to dismiss for failure to prosecute an appeal necessarily imply that the commission has authority, when the just disposition of an appeal requires it, to extend the deadline for filing an appeal to the commission if evidence supports the extension.

We must also recognize that the commission is part of a greater whole. The commission lies within the Department of Labor and Workforce Development; it is a part of the workers’ compensation system. Within this system, there should be sufficient flexibility to advance the purposes for which the commission exists, (to review board decisions and provide a final administrative determination of questions appealed to it), so long as such flexibility does not impair the quick, efficient, and fair operation of the administrative system as a whole. Occasional extensions for meritorious reasons do not significantly impair the efficiency of the system, but they may promote fairness and certainly advance the commission’s review of board decisions. For that reason also, I believe that the commission’s authority may be exercised to allow late-filed appeals to the commission.

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<sup>18</sup> AS 23.30.127(f).

<sup>19</sup> AS 23.30.128(c).

I agree with my fellow appeals commissioners that we must be mindful of the legislature's directive that workers' compensation system be quick and efficient. Our power to make orders is granted the purpose of advancing the prompt, as well as just and fair, disposition of appeals. The prompt disposition of appeals is not advanced by extensions of time. It is not fair to hold one party to the strict application of the statute because the party has an attorney, but relax the statute's deadlines for another party *only* because the latter party lacks an attorney. Therefore, any exercise of the commission's implied authority under AS 23.30.127(f) to allow an appeal to be filed late must balance the statutory obligation to be "prompt, fair, and just" in our handling of appeals. In view of the statute directing that appeals be filed within 30 days, and the absence of explicit statutory excuse to extend the deadline, I believe that late-filed appeals should only be allowed in compelling circumstances.

Our regulation permits extension of time upon a showing of "good cause."<sup>20</sup> In determining whether there is good cause in any motion to allow a late filed appeal, I believe the commission should look to a number of factors: the demonstration of diligence by the appellant (such as timely, but mistaken, attempts to file an appeal),<sup>21</sup> the willfulness and extent of the delay, the importance of the right to review, and the possibility of injustice if we do not permit an appeal.<sup>22</sup> If these factors are applied to the facts of this case, Berean fails to show "good cause."

Berean did not show diligence. He did not file even a defective notice of appeal on time, although he was sent forms by the commission and was urged to come into the commission office by commission staff and file his appeal before the deadline. He

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<sup>20</sup> 8 AAC 57.140(a).

<sup>21</sup> *Cf.*, *Collins v. Arctic Builders*, 957 P.2d 980, 981 n. 1 (Alaska 1998); *but cf.*, *Powers v. State, Pub. Employees' Ret. Bd.*, 757 P.2d 65, 66-67 (Alaska 1988) (A four-day delay without a *meritorious* motion to accept the late filing held sufficient to warrant dismissal of an appeal. Rabinowitz, J. dissenting, held the dismissal sanction was extreme for a delay not shown to disadvantage the state, as the reason given for the delay was "far from untenable." *Id.* at 68.).

<sup>22</sup> *Jerrel v. Kenai Peninsula Borough School Dist.*, 567 P.2d 760, 766 (Alaska 1977).

did not mistakenly file his appeal with the board.

Berean's delay was not extensive, but it was demonstrably willful. He consulted attorneys prior to the deadline, and he was repeatedly advised to file his appeal within 30 days. He offered no explanation for his delay other than when he thought about the decision, he became angry and frustrated, and set it aside, or that he was "overwhelmed." Nonetheless, his anger and frustration, or being overwhelmed, did not prevent him from coming to Anchorage and consulting lawyers about an appeal, calling the court, or discussing the matter with friends. He claimed he was too proud to ask for help filling in the forms, but he admitted he called the commission office and he was assured that the staff would assist him. Although his writing was poor, and he stated he is not good with paperwork, his oratory is powerful and sophisticated. He states he dropped out of school in the twelfth grade, but he claims that he is a long time pilot, although he cannot pass the licensing exam. He presented as a commanding and self-confident man who has chosen his own way of life. He was not anxious, timid, or inhibited. While he made a point of not being a lawyer, he demonstrated understanding of his actions.<sup>23</sup> He disclaimed any mental disorder, and stated he refused to follow the advice of an attorney to claim his delay was due to mental illness.

The right involved in this appeal is important. Berean's claim was dismissed without a hearing on the merits as a sanction for failure to comply with discovery orders to attend depositions and provide releases of information. The legislature stated its intent that "cases shall be decided on their merits, except where otherwise provided by

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<sup>23</sup> Berean strongly opposed the employer's efforts to litigate his claim for a late-reported injury on its merits. His answers to board questioning in the hearing were often non-responsive and tangential, but reflected understanding of his legal situation. By filing this appeal late, he converted an appeal on the merits of the board's dismissal to a potential appeal on a point he is more likely to win as a pro se appellant who filed late – but not very late – at little cost to himself. Allowing no discovery of the strengths or weaknesses of his claim, yet preserving his claim rights if the decision is reversed, he pushed his opponent into a position where the anticipated cost of further appellate defense, and the possibility that the Supreme Court will reverse because he delayed less than 30 days, outweigh the probable cost of a "nuisance" settlement. This is not the strategy of an artless and unintelligent litigant.



APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission dismissed the appeal of the board's decision that dismissed the workers' compensation claim. The appeals commission's decision ends all administrative proceedings in the workers' compensation claim. It becomes effective when filed in the office of the appeals commission unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is filed 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. To see the date this decision is filed, look at the clerk's Certification below.

A request for commission reconsideration must be filed within 30 days of the date of service of the decision. 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 appeal this decision 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 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 appeals 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 the final Decision and Order on Appeal in the matter of *Mark C. Berean v. Coleman Brothers Timber Cutting, Inc. and Liberty Northwest Insurance Company*, Appeal No. 07-026; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this 2nd day of August, 2007.

Signed  
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R. M. Bauman, Appeals Commission Clerk

<u>Certificate of Service</u> I certify that a copy of this Final Decision and Order in AWCAC Appeal No. 07-026 was mailed on <u>8/2/07</u> to Berean (certified) & Holloway at their addresses of record and faxed to Holloway, Director WCD, & AWCB Appeals Clerk.  <u>Signed</u> _____ <u>8/2/07</u> L. Beard, Deputy Clerk Date
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