

Alaska Workers' Compensation Appeals Commission

Tom Wolford,
Appellant,

vs.

David R. Hanson,
Appellee.

Memorandum Decision and Order

Decision No. 030 February 2, 2007

AWCAC Appeal No. 06-011

AWCB Decision No. 06-0064

AWCB Case No. 200418129

Appeal from Alaska Workers' Compensation Board Decision No. 06-0064, issued on March 23, 2006, by the southeastern panel at Juneau, Krista Schwarting, Chair, Richard Behrends, Member for Management, Jay Rhodes, Member for Labor.

Appearances: A. Fred Miller, P.C., for appellant Tom Wolford, Jon Buchholdt, Buchholdt Law Offices, for appellee David R. Hanson.

Commissioners: John Giuchici, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

The only question presented by this appeal¹ is whether the appellant, then a self-represented litigant, was afforded due process when the board heard a claim for compensation against him in his absence despite his efforts to reschedule the pre-hearing conference and hearing so that he could be present. We hold that in the particular circumstances of this case the appellant was not afforded due process. Only the board can decide whether Wolford or Hanson is more credible. The board did not have the opportunity to make that decision. If the board had been able to hear Wolford and Hanson together, each party cross-examining the other, the outcome may,

¹ The appellant's notice of appeal included by reference the points argued in his petition for reconsideration. That petition argued the board erred by going forward without Wolford being present and by finding Wolford was Hanson's employer. At the time of hearing oral argument on the appeal, Wolford stated that the appeal was limited only to whether he was afforded due process.

or may not, have been different. Our concern in this appeal is that both parties should have the opportunity to allow the board to assess their credibility and their evidence. We make no findings of fact and we do not express any opinion respecting the merits of this case. Therefore, we remand the case to the board for rehearing to allow the appellant the opportunity to present his testimony in person.

*Factual background and board proceedings.*²

David Randall Hanson was a logger. Hanson's left thumb was amputated by a falling tree on October 5, 2004. He filed a claim for compensation on November 17, 2004, naming Alfred "Tom" Wolford of Thorne Bay as his employer.³ Wolford wrote a letter to the board stating he did not hire Wolford and that Wolford was a "cutting contractor for the property owners."⁴ Wolford said he did not receive any compensation from the property owners, and that he found Hanson "as a personal favor to the property owners."⁵

We describe the proceedings in the Division of Workers' Compensation⁶ prior to the January 17, 2006 hearing in some detail, citing to the board's record. Workers' compensation officer Bruce Dalrymple conducted a pre-hearing conference in Juneau on

² The commission does not make findings of fact on appeal. The brief summary of the facts here should not be construed as commission findings, or as adoption of the board's findings; we summarize the facts to set the appeal in context.

³ R. 002-3.

⁴ R. 068.

⁵ *Id.*

⁶ The Department of Labor and Workforce Development's Division of Workers' Compensation provides, through its adjudication section staff, support to the Alaska Workers' Compensation Board. Workers' compensation officers employed in the division's adjudication section are delegated authority to conduct pre-hearing conferences by the board. AS 23.30.108, AS 23.30.110(c), 8 AAC 45.065.

January 13, 2005, between Hanson and Wolford.⁷ Dalrymple recorded the following summary of the parties' position:

David: believes he was an employee of Tom's. He was told by Tom that he (Tom) was under contract to the landowners to clear a couple of lots and Tom needed a cutter. Was told he would be hired for 3 days work at \$350-400 per day. Tom told him which trees needed to be cut and which did not. Tom didn't pay him but the landowners did. He has not cashed the check.

Tom: he was not under contract to the landowners. He knew the owners and they had asked him if he knew of any cutters who would be willing to clear the lots. He said he did and, as a personal favor to the landowners, suggested David. The landowners are Jay Dilsworth and Patrick Fox.

Chair: this issue will not be settled at a prehearing. It will take a Board decision to determine if there actually was an employee/employer relationship. Advised David of his right to request a full Board hearing and will provide him with the necessary paperwork.⁸

There is no record of more pre-hearing conferences until after September 26, 2005, when Hanson filed an affidavit of readiness for hearing.⁹ The same day, the division received a statement by Monte McDonald relating that Wolford "talked about small parcels of timber that needed to be cut and sold."¹⁰ McDonald stated that "I assumed the timber would be purchased and sold by Tom's employer" and that he "told Tom that maybe Randy Hanson might be available and interested in falling the timber."¹¹ No certificate of service was attached to McDonald's statement indicating Hanson mailed a copy to Wolford.

⁷ R. 073.

⁸ R. 073.

⁹ R. 007. The same day, Hanson filed a 3-page hand written "Statement of Facts," R. 080-82, which did not include a certificate showing service on Wolford.

¹⁰ R. 004-6.

¹¹ R. 004-5.

Dalrymple sent a letter giving notice to Hanson and Wolford that a pre-hearing conference would be held on November 23, 2005 at 10:30 a.m.¹² The letter contained the following statements:

The Purpose of this Conference is to frame issues, record any agreements, exchange witness lists, examine the Board's records and provide the parties with the opportunity to resolve the issues of the case.

If you are unable to attend, please notify me and the opposing parties. The conference may be rescheduled. If you live outside the Juneau area, you may participate by telephone.

On November 15, 2005, the Juneau division office received a letter from Wolford, asking that the pre-hearing conference be rescheduled until January 30, as he was in the process of acquiring an attorney.¹³ The pre-hearing conference went ahead as scheduled with no recorded effort to contact Wolford or reschedule.¹⁴ It was conducted by Kristy Donovan, a workers' compensation officer located in Anchorage.¹⁵ Donovan's summary states that a hearing was "set for January 11, 2006."¹⁶ It also states that "Briefs and Witness Lists must be filed with the board on January 3, 2005 [sic] and a copy must be sent to the opposing party."¹⁷

Wolford wrote a letter to Donovan received by the Anchorage division office on December 6, 2005. He asked that the hearing be rescheduled for the latter part of February 2006 because he would be out of town "until latter January 2006."¹⁸ He gave a new address in Kodiak, and explained that he had asked that the prehearing

¹² R. 083.

¹³ R. 084.

¹⁴ R. 085.

¹⁵ *Id.* The summary indicates that the conference was conducted in Juneau, but there is no note in the summary regarding Wolford's request for a continuance.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ R. 087.

conference be delayed, pointing out that he had a "green certified receipt" showing his letter to Dalrymple was received in Juneau on November 15, 2005.¹⁹ He also stated he had sent a copy of his letter to Hanson.²⁰

The division responded on December 9, 2005, by sending Hanson and Wolford another letter giving notice of another pre-hearing conference on December 21, 2005.²¹ This letter was signed by Joireen Cohen, a workers' compensation officer in the division's Anchorage office.²² It contained the same language as Dalrymple's letter:

The Purpose of this Conference is to frame issues, record any agreements, exchange witness lists, examine the Board's records and provide the parties with the opportunity to resolve the issues of the case.

If you are unable to attend, please notify me and the opposing parties. The conference may be rescheduled. If you live outside the Juneau area, you may participate by telephone.²³

On December 15, 2005, Wolford faxed a request addressed to Joireen Cohen, once again asking that the pre-hearing conference be rescheduled to February 2006 because he would be out of town until "latter January 2006."²⁴ The record contains no written response or note of a telephone call to Wolford.

The pre-hearing conference was held on December 21, 2005, as scheduled.²⁵ The conference was held by Donovan, who made the following notes in her summary:

Mr. Wolford did not attend the PH [pre-hearing conference].

¹⁹ *Id.*

²⁰ *Id.*

²¹ R. 089. The letter was sent to Wolford's Kodiak address.

²² *Id.*

²³ *Id.*

²⁴ R. 090.

²⁵ R. 091.

The PH was requested by Mr. Wolford. Mr. Wolford sent a letter stating he would be out of state on January 17, 2006, when the hearing was scheduled.

Since Mr. Wolford did not attend the PH, the hearing will remain on the calendar for January 17, 2006. If Mr. Wolford would like to have the date of the hearing changed, he must file a Petition with the board requesting the hearing date be changed.²⁶

On January 5, 2006, the same day the notice of hearing was sent, the Anchorage division office received and noted as "input" a petition form signed by Wolford.²⁷ The petition reiterated Wolford's position that he was not the employer,²⁸ and contained the following statement:

I request a new pre-hearing date in latter February. I requested a later one than one in November. I told her my schedule to be out of state. The letter sat on Mr. Dalrymple's desk. I requested one with Kristy Donovan. I told her my schedule to be out of state. They issued one after I left Alaska. I will be back in Alaska in latter January. Please issue a pre-hearing in latter February 2006.

Wolford certified he sent a copy of the petition to Hanson.²⁹ No written response is contained in the record. There is no note of telephone contact with Wolford. The same day, the Juneau division office received a witness list from Hanson, with no certificate of service indicating it was mailed to Wolford.³⁰ On January 9, 2006, the board received Hanson's 5-page hand-written brief, without certificate of service.³¹ However,

²⁶ *Id.*

²⁷ R. 008-09. The upper left corner of the first page, R. 008, contains a note dated January 13, 2006 that the file is in Juneau. Since there would be no need to note that the file was in Juneau if the petition were in Juneau, it may be inferred that as late as January 13, 2006, the petition form was still in Anchorage.

²⁸ R. 009.

²⁹ R. 009.

³⁰ R. 010.

³¹ R. 011-15.

the last page of the brief contains a note in different ink, with unknown initials "cc: Tom Wolford 1-09-06."³²

The board met in Juneau on January 17, 2006, to hear Hanson's claim. The chair made the following statement at the beginning of the hearing:

We need to note for the record at this point that Tom Wolford, the employer is not present in this room. I spoke briefly with the Prehearing officer Mr. (Indiscernible), prior to beginning the hearing. He indicated he had not heard from Mr. Wolford. I note for the record that the hearing was noticed on January 5th, 2006 and prior to that there was actual notice given in the form of a prehearing summary dated December 21st, 2005 although Mr. Wolford did not attend that prehearing, a copy was sent to him, he had prior to that conference requested a change in date of the hearing because he would be out of state on today's date. However he did not petition to have the hearing date changed. So what the board finds at this point, is that the employer had actual notice of the hearing and made no formal steps to change the date of today's hearing to have it continued. Therefore it's the board's decision that we will proceed in the employer's absence.³³

Hanson's testimony was taken at length. In addition, he offered a notarized statement by Monte McDonald, Greg Turcotte,³⁴ Julie Hanson's testimony,³⁵ testimony by Paul Fitzpatrick,³⁶ and testimony by Amelia Dilworth.³⁷ He also offered an advertisement.³⁸ At the end of the hearing, the board left the record open to receive

³² R. 015.

³³ Tr. 3-4.

³⁴ Tr. 19. Turcotte was not actually called to testify.

³⁵ Tr. 31-35. Julie Hanson is the spouse of David Hanson.

³⁶ Tr. 19. Fitzpatrick's testimony was offered and described by Hanson, but the board chair indicated she was not sure his testimony about Wolford was relevant. Hanson then withdrew the witness. Tr. 20.

³⁷ Tr. 21-28.

³⁸ Tr. 20. Hanson related various statements by persons not called as witnesses connected with the advertisement.

documents from Hanson, including "information on everything that's outstanding in terms of bills, . . . everything that's been paid out of pocket . . . what time you've lost from work."³⁹ In addition, the board requested a rating of permanent partial impairment.⁴⁰ Hanson was given three weeks to submit the information to the board.⁴¹ There is no record that the board notified Wolford that the record of the hearing remained open until February 7, 2006. Hanson submitted the information on February 1, 2006,⁴² but there is no indication in the record that he mailed a copy to Wolford.

The board issued a final decision on March 23, 2006. The board made the following findings of fact:

The Board finds that the employee had ample notice of the hearing scheduled for January 17, 2006. The Board further finds that the hearing notice was timely sent to the employer by both regular and certified mail at the correct address, and that the hearing notice sent by regular mail was not returned to the board. The Board finds that the employer had actual and ample notice of the hearing scheduled for January 17, 2006. The board further finds that it had jurisdiction to proceed with the hearing, as the employer was properly served. Since the employe[e] appeared and was ready to proceed, the Board elected to proceed in the employer's absence pursuant to 8 AAC 45.070(f)(1).⁴³

³⁹ Tr. 41.

⁴⁰ Tr. 42.

⁴¹ Tr. 41, 44.

⁴² R. 095-102.

⁴³ *David R. Hanson v. Tom Wolford*, AWCB Dec. No. 06-0064, 4 (March 23, 2006); R. 106. The regulation cited, 8 AAC 45.070(f), provides:

If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

The board concluded that Hanson was an employee of Wolford, "under AS 23.30.395(12) and (13), at the time of his injury, and his claim is compensable."⁴⁴ The board awarded "an undetermined amount of medical benefits . . . and transportation costs," permanent partial impairment compensation based on a nine percent rating; and retained jurisdiction to award temporary total disability compensation, medical benefits, and transportation costs "pending receipt of further evidence."⁴⁵ This appeal followed.

The commission standard of review.

In determining what a party's right to due process entails in the board hearing context, we look to assure that the board was an impartial tribunal, that no findings were made except on due notice to all parties and opportunity to be heard, that the procedure at the hearing was consistent with fairness, and that the hearing was conducted in such a way that there is an opportunity for this commission to ascertain whether the applicable rules of law and procedure were observed.⁴⁶ In doing so, we enforce the legislature's direction that "hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered."⁴⁷

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- (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
 - (2) dismiss the case without prejudice; or
 - (3) adjourn, postpone, or continue the hearing.

⁴⁴ *David R. Hanson*, AWCB Dec. No. 06-0064 at 7; R. 109.

⁴⁵ *Id.*

⁴⁶ *K & L Distributions, Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971).

⁴⁷ AS 23.30.001(4).

We review the board's application of its regulations to determine if the decision of the board, or the board's designee, was arbitrary, unreasonable, or an abuse of discretion.⁴⁸ An abuse of discretion is established if a decision is contrary to law. Although we generally will not disturb an exercise of the board's discretion unless we are firmly convinced that the board made a mistake, we are required to exercise our independent judgment on questions of law and procedure.⁴⁹

Discussion.

The only question presented in this appeal is whether the board erred in going forward with the hearing without Wolford's presence. The decision to grant a continuance or postpone a hearing in the absence of a party is committed to the board's discretion, and it is not a favored response to the absence of a party.⁵⁰ Nevertheless, our thorough review of the record leaves us with the firm conviction that the board erred in this case by failing to postpone the hearing.

Impartiality of the tribunal.

Workers' compensation hearings are required to be impartial. When both parties are self-represented, as was the case here, the board, and its designees, must be careful that the obligation to inform and instruct is satisfied as to both parties. The board obligation, described in *Richard v. Fireman's Fund Ins. Co.*,⁵¹ to assist self-represented litigants by instructing them how to pursue their claims and to inform them of the important facts that bear upon their claims⁵² must apply to both injured

⁴⁸ *Lindhag v. State, Dep't of Natural Resources*, 123 P.3d 948, 952 (Alaska 2005).

⁴⁹ AS 23.30.128(b): "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."

⁵⁰ 8 AAC 45.070(f); see also 8 AAC 45.074.

⁵¹ 384 P.2d 445 (Alaska 1963).

⁵² 384 P.2d at 449.

claimants and the self-represented defendants, or the hearing process cannot be considered impartial.

In the first pre-hearing conference held in 2004, workers' compensation officer Dalrymple made a note that he had informed Hanson, the claimant, of the need to request a hearing and provided him with forms. There is no note that Dalrymple gave similar information and forms to Wolford. It could be that he did, but there is no record that he did so. There was no note in the record or November pre-hearing summary that Hanson was advised to send a copy of the McDonald statement he had filed in September 2005 to Wolford. Although Hanson was advised to send a copy of his witness list and brief to Wolford, he submitted a brief and witness list without proof of service on Wolford. The division officer made a note that a copy of the brief was mailed by the officer to Wolford – but there is no such note on Hanson's witness list. There is no record of a written response to Wolford's letters, or staff notations of telephone contacts with Wolford. It may be that such contacts occurred, but a reviewer cannot assume they occurred. We make no findings of fact regarding the claims of the parties, but we agree that the record in its current state shows that the obligation to inform and instruct was not impartially delivered to both self-represented litigants in the pre-hearing process.

Notice to all parties and opportunity to be heard.

For a board hearing to comply with due process requirements there must also be notice to all parties and an opportunity to be heard.⁵³ In this case, although the board found that Wolford had received notice of the hearing, it also found, erroneously, that he had taken "no formal steps to change the date of today's hearing to have it continued."⁵⁴ In fact, the record reflects that from the point at which the notice of the November 23, 2005 pre-hearing was sent out Wolford attempted to reschedule both pre-hearings and the hearing. His request to reschedule the hearing was interpreted as

⁵³ *K & L Distributions*, 486 P.2d at 357.

⁵⁴ Tr. 4.

a request for another pre-hearing. When he did not attend this second pre-hearing, as he had indicated he could not, the pre-hearing officer declined to change the scheduled hearing date. She instructed him to petition the board for a new date; but when he did so, his petition, although received in Anchorage, failed to reach the board in Juneau prior to the hearing.

In making its determination to proceed with the hearing despite Wolford's absence, the Board properly interpreted its regulation regarding dealing with absent parties.⁵⁵ But the determination also reflects an incomplete and clearly erroneous understanding of the steps taken by Wolford to try to reschedule the hearing so that he might attend. This error does not appear to be a result of division regulations or procedures, but rather a breakdown in communication among the division personnel involved. Wolford was not given a meaningful opportunity to be heard. The division failed to respond to his attempts to reschedule the hearing. There is no record that he was aware of the witnesses against him.⁵⁶ The chair's statement at the hearing that he had not filed a petition was plainly wrong.⁵⁷

Determining whether administrative proceedings satisfy due process involves a balancing analysis. The private interest affected, the risk of erroneous deprivation of

⁵⁵ See 8 AAC 45.070(f).

⁵⁶ The witness list that Hanson sent to the Juneau division office had no certificate of service showing that it was mailed to Wolford. R. 010. Similarly, the statement made by Monte McDonald and provided by Hanson to the division did not include a certificate of service on Wolford. R. 004-6.

⁵⁷ We note that the board kept the record open for three weeks after the hearing, but the record contains no note that the board attempted to inform Wolford of that fact, or that it instructed Hanson to send a copy of the documents Hanson was told to submit to Wolford. Tr. 41-44. The record is silent whether Wolford's petition finally made its way into the file while the hearing record was open. If it had, there was an opportunity for the error to be corrected by noticing a hearing so that Wolford could appear and testify. Instead, even as late as the time the hearing officer wrote the decision, the error about Wolford's petition appears not to have been recognized. Neither the petition, nor the hearing officer's finding that "he did not petition to have the hearing date changed" was mentioned in the board's decision. *David R. Hanson v. Tom Wolford*, AWCB Dec. No. 06-0064, 4 (March 23, 2006).

that interest under the procedures followed and whether different procedures would reduce that risk, and the government interest are considered together in assessing due process claims.⁵⁸ In this case, the private interest affected is more than just the monetary claim by Hanson. Other important rights are implicated. An employee has the right to sue an uninsured employer;⁵⁹ and an uninsured employer is subject to severe penalties, including criminal penalties.⁶⁰

Moreover, the risk to the parties of erroneous deprivation in this case is high. As we have said before, we express no view as to the merits of whether Wolford should be considered an employer in this case. However, the resolution of that question turns on the credibility of the parties. The Alaska Supreme Court held in *Whitesides v. State, DMV*,⁶¹ that when the credibility of a party is at issue, the party has a right to appear *in person* before the factfinder. This case was decided without Wolford's testimony, or an opportunity to appear in person, even though the first pre-hearing summary indicated a testimonial dispute was likely.⁶²

Finally, we note that the government interest here is minimal. The due process violation in this case did not result from the design of division procedures but rather from a failure to communicate between division offices; therefore, no government interest is at stake here. Thus, we find that the decision to proceed with the hearing in Wolford's absence violated his right to due process.

Conclusion

Wolford attempted to reschedule the date of his hearing so that he could attend. As a result of a series of communication errors in the pre-hearing process, leading to a

⁵⁸ See *Noden v. Commercial Fisheries Entry Comm'n*, 680 P.2d 493, 499 (Alaska 1984) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (U.S. 1976)).

⁵⁹ See AS 23.30.055.

⁶⁰ See AS 23.30.080, 23.30.085, 23.30.255.

⁶¹ 20 P.3d 1130 (Alaska 2001).

⁶² R. 073.

mistaken finding by the hearing officer, Wolford was effectively denied the opportunity due process requires -- to face the people who will decide the case against him.

Therefore, we VACATE the decision of the Board, and REMAND this case to the board for rehearing, so that Wolford may have an opportunity to present his side of the case.

Date: 2 February 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Philip Ulmer, Appeals Commissioner

Signed

John Giuchici, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final commission decision on the merits of the board's decision and order awarding the claimant compensation. It is not a final adjudication of the rights of the parties respecting the claim. It is a final decision on whether the appellant is allowed to have the board hear the claim again, and it sends the case back to the board to rehear the claim. For the appellee, it is a final decision vacating the board's decision in his favor, but the commission did not rule on the merits of his claim and the board could award compensation to him again after rehearing his claim. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek 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. Because this is not a final decision that finally adjudicates either party's rights in the claim, the Supreme Court might not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition for review within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or 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 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

A party may ask the 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 the Memorandum Decision and Order, AWCAC Dec. No. 030, in the matter of *Tom Wolford v. David R. Hanson*, AWCAC Appeal No. 06-011, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 2nd day of February, 2007.

Signed

C. J. Paramore, Appeals Commission Clerk

DISTRIBUTION: I certify that a copy of this Memorandum Decision and Order in AWCAC Appeal No.06-011 was mailed on 2/2/07 to Buchholdt, Miller, at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, Miller, and Buchholdt.

Signed

C.J. Paramore, Appeals Commission Clerk