

Alaska Workers' Compensation Appeals Commission

Mary I. Thoeni,
Appellant,

vs.

Consumer Electronic Services and
Alaska National Insurance Co.,
Appellees.

Memorandum Decision and Order

Decision No. 039 April 30, 2007

AWCAC Appeal No. 07-002

AWCB Decision No. 06-0327

AWCB Case No. 200005049M

Memorandum Decision and Order on motion to dismiss appeal from Alaska Workers' Compensation Board Decision No. 06-0327, issued December 12, 2006, by the south-central panel at Anchorage, Fred G. Brown, Chairman, Robert Morigeau, Member for Labor, and H. Bardie Scarbrough, Member for Industry.

Appearances: Mary I. Thoeni, appellant, pro se. Timothy A. McKeever, Holmes, Weddle & Barcott, PC, for appellees, Consumer Electronic Services and Alaska National Insurance Co.

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

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

By: Kristin Knudsen, Chair.

On March 30, 2007, the commission heard oral argument from Mary Thoeni and appellees' counsel, Timothy McKeever, on a series of motions: appellant's motion to accept her late-filed appeal, appellees' motion to dismiss the appeal, appellant's motion to waive transcript or in the alternative for preparation of a transcript at public expense, and, appellees' motion to require preparation of a transcript. The appellees concede that Thoeni's initial notice of appeal was timely.¹ For reasons we explain below, we

¹ Thoeni appealed a board decision issued December 12, 2006, but Thoeni filed a timely request for reconsideration on December 27, 2006. The board failed to act on her request for reconsideration, so her request was deemed denied by operation of AS 44.62.540(a) on January 11, 2007. Her notice of appeal was filed in the

conclude that jurisdiction over Thoeni's appeal remains in the Superior Court. We stay all proceedings in this appeal to allow Thoeni to file a motion to resume proceedings in her Superior Court appeal, so the Superior Court may determine what part of Thoeni's appeal, if any, is without Superior Court jurisdiction and therefore within the scope of the commission's authority.

Factual background and prior proceedings.

The history of proceedings in Thoeni's workers' compensation case is complicated, and we do not attempt to review it in detail here. Thoeni reported two injuries: a March 27, 2000 fall at work resulting in left knee injury; and, an October 9, 2000 chest pain incident. The employee filed claims for different benefits for both of these injuries. In September 2001, she filed claims for depression and insomnia related to the pain of her injuries. All these claims were heard by the board in September 2002 and a decision was issued on October 17, 2002.² Thoeni appealed the board's decision to the Superior Court.³ The employer petitioned for reconsideration. The board issued a decision on reconsideration⁴ which was also appealed to the Superior Court and joined in Superior Court No. 3AN-02-12246 Civil. Thoeni also filed a new claim for benefits from her March 2000 injury on December 12, 2002 seeking substantially similar

commission on February 9, 2007, within 30 days of denial of the petition for reconsideration. Although the commission's February 13, 2007 docket notice identified the appeal as untimely because the notice of appeal failed to indicate that a petition for reconsideration had been filed, Thoeni's notice of appeal in fact was timely under AS 23.30.127(e). Thoeni's notice of appeal substantially complied with the statute and regulations, so we excuse the minor deficiencies of her initial filing.

² *Mary I. Thoeni v. Consumer Elec. Serv.*, AWCB Dec. 02-0215 (October 17, 2002) (*Thoeni I*).

³ *Thoeni v. Consumer Elec. Serv.*, 3AN-02-12246 Civ. (Alaska Super. Ct.).

⁴ *Mary I. Thoeni v. Consumer Elec. Serv.*, AWCB Dec. 02-0326 (November 14, 2002) (*Thoeni II*).

benefits to those she sought in her previous claims. The board issued an order on legal costs and fees in 2003.⁵

The Superior Court ruled on the appeal on March 17, 2005. The Superior Court affirmed the board in part, reversed in part:

Based on the record before the superior court, the Board's following decisions were not supported by substantial evidence:

1. That Ms. Thoeni's knee injury was medically stable from October 9, 2000 through November 2, 2000; and
2. That Ms. Thoeni forfeited her right to TTD benefits from November 26, 2001 through May 30, 2002.

In all other respects the Decisions dated October 17, 2002 and November 14, 2002 are affirmed.⁶

The appellees sought reconsideration and Judge Christen issued a "Ruling on Reconsideration" that concluded:

The issues for which Appellees sought reconsideration should be raised below, so that the Board may clarify its findings. The court remands this matter to the Board for proceedings consistent with this Order and the Ruling on Appeal dated March 17, 2005.⁷

Thoeni appealed Judge Christen's decisions to the Supreme Court. The Supreme Court treated the improperly brought appeal as a petition for review and granted review.⁸ She also filed a new claim for benefits based on the same injuries on March 27, 2005.

⁵ *Mary I. Thoeni v. Consumer Elec. Serv.*, AWCB Dec. 03-0028 (February 10, 2003) (*Thoeni III*).

⁶ Ruling on Appeal from the Decisions of the Alaska Workers' Compensation Board Dated October 17, 2002 and November 14, 2002, *Thoeni v. Consumer Elec. Serv.*, 3AN-02-12246 Civ., at 18 (Alaska Super. Ct. March 17, 2005) (M. Christen, Judge).

⁷ Ruling on Reconsideration, *Thoeni v. Consumer Elec. Serv.*, 3AN-02-12246 Civ., at 3 (Alaska Super. Ct. April 13, 2005) (M. Christen, Judge).

⁸ *Thoeni v. Consumer Elec. Serv.*, 151 P.3d 1249, 1254 (Alaska 2007).

In July 2005, the board held a two-day hearing to consider issues relating to the remand, petitions to dismiss the employee's claims, the employee's various claims, and other petitions.⁹ The board required additional time to review the record, so the record was not closed until November 15, 2006.¹⁰ Meanwhile, it appears that discovery disputes had arisen and the board took up a number of discovery issues in August 2005 when it considered Thoeni's appeal of a board designee's order to sign releases. The board's September 26, 2005 interlocutory decision comprehensively reviewed those issues.¹¹

On December 12, 2006, the board issued a lengthy decision and order disposing of the issues on remand, dismissing the December 2002 claim as time-barred under AS 23.30.110(c), ordering the employee to comply with discovery requests, deferring a decision on a request for an independent medical examination under AS 23.30.110(g), and denying various other claims. The final order states:

1. The employer shall pay the employee any unpaid interest payments in accord with this decision. We reserve jurisdiction to decide computation disputes.
2. The employee's claims for additional workers' compensation benefits, not related to medical treatment of her knee, are denied and dismissed at this time. Claims arising after December 2002 may be considered upon the completion of the discovery process.¹²

It is this decision which is the subject of Thoeni's appeal to the commission. Shortly afterward, the Supreme Court issued its decision, concluding:

Because substantial evidence did not support the board's conclusion that Thoeni's refusal to attend the Utah EIME was unreasonable, the board abused its discretion when it ordered

⁹ *Mary I. Thoeni v. Consumer Elec. Serv.*, AWCB Dec. 06-0327, 1-2 (December 12, 2006) (*Thoeni V*).

¹⁰ *Id.* at 1.

¹¹ *Mary I. Thoeni v. Consumer Elec. Serv.*, AWCB Dec. 05-0244 (September 26, 2005) (*Thoeni IV*).

¹² *Thoeni V* at 21.

Thoeni's TTD benefits forfeited from January 25 to February 21, 2001. We thus REVERSE the board on this point. Because the board's reliance on predictive testimony that proved to be inaccurate cannot constitute substantial evidence, we also REVERSE on the issue of medical stability. The board's remaining conclusions are supported by substantial evidence, and Thoeni's contentions of irregularity are not a basis for overturning the board's rulings. Accordingly we AFFIRM the decision of the board in all other respects.¹³

Neither party presented a final order from the Superior Court.

Discussion.

The appellees argue that Thoeni must complete her appeal in the Superior Court, because the case had been remanded to the board for further proceedings, the board's decision incorporates the further proceedings, and the Superior Court retained jurisdiction to issue the final order in the appeal. The appellees also argue that the record in this case is so voluminous and complex, and the issues so closely intertwined, that it makes sense for the Court, already familiar with Thoeni's case, to handle all issues on appeal. Thoeni concedes that the first two of her points on appeal did concern the remanded appeal, but argues that the majority of her points on appeal concern issues that were not the subject of her original appeal to the Superior Court. Therefore, she argues the commission has jurisdiction of an appeal on her remaining points.

The questions presented in the motion to dismiss this appeal do not require us to review the board's findings of fact to determine if they are supported by substantial evidence in light of the whole record, or the board's application of workers' compensation law. The motion to dismiss asks us to "issue other orders as appropriate" in an appeal.¹⁴ The motion raises questions of law and procedure; on such questions we are required by AS 23.30.128(b) to exercise our independent judgment.

¹³ 151 P.3d at 1260.

¹⁴ AS 23.30.128(d).

As the Supreme Court stated in its decision in this case, a superior court decision remanding a matter to an administrative agency is not a final, appealable order.¹⁵ The court had sole and exclusive jurisdiction over the issues raised on appeal once an appeal was taken¹⁶ until a final order is issued. Unless the Superior Court remands for a strictly “ministerial” act,¹⁷ the Superior Court’s decision is not final. The Superior Court implicitly retains jurisdiction to examine the results of the board proceedings on remand and to enter a final appealable order.¹⁸

Judge Christen did not enter a final judgment, so two discrete issues remained within the Superior Court’s jurisdiction even after an appeal was taken to the Supreme Court.¹⁹ We believe that the Superior Court implicitly retained jurisdiction of the appeal because the Court’s decision did not make a final disposition of the parties’ rights in the first appeal, and these issues were not fully disposed of in the Supreme Court’s decision. Judge Christen’s remand order was not ministerial because it required the board to exercise the board’s statutory power to make findings of fact related to whether payments had been made and related to whether Thoeni refused to sign

¹⁵ 151 P.3d at 1253. *See also, Gunter v. Kathy-O Estates*, 87 P.3d 65, 71 n.21 (Alaska 2004); *Tlingit Haida Regional Elec. Authority v. State*, 15 P.3d 754, 761 (Alaska 2001); *Stalaker v. Williams*, 960 P.2d 590, 592 (Alaska 1998).

¹⁶ *Fischback & Moore of Alaska, Inc., v. Lynn*, 407 P.2d 174, 176 n. 4 (Alaska 1965), *overruled in other part by City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 (Alaska 1979).

¹⁷ *Municipality of Anchorage, Police and Fire Retirement Bd. v. Coffey*, 893 P.2d 722, 725 n. 6 (Alaska 1995).

¹⁸ *See, Dep’t of Trans. v. Grawe*, 447 N.E.2d 467, 470, 113 Ill. App. 3d 336, 341 (Ill. App. Ct. 1983). This process avoids piecemeal appeals and promotes judicial economy. *Horsley v. North Dakota Workers’ Comp. Bureau*, 623 N.W.2d 377, 381 (N.D. 2001).

¹⁹ *Thoeni*, 151 P.3d at 1254, characterizing the issues remanded to the board as “a small and discrete part of the entire dispute.”

releases, so forfeiting benefits.²⁰ The Superior Court necessarily retains jurisdiction of these issues because it had yet to enter a final order in the appeal filed by Thoeni, who is now seeking to appeal the board's decision on the Court's remand to the commission.

We believe the legislature intended that the Superior Court's jurisdiction over pending appeals be saved to the Superior Court upon the effective date of the bill creating this commission, for some of the same reasons that we stated in *Adepoju v. Fred Meyer Stores, Inc.*²¹ As we said in *Adepoju*,

Section 80, ch. 10 FSSLA 2005 saved jurisdiction over pending appeals to the superior court. When the legislature enacted the amendments creating this commission, the legislature also provided that "litigation... and other proceedings pending under a law amended or repealed by this Act or in connection with functions transferred by this Act continue in effect and may be continued and completed...." We interpret this phrase to mean that the legislature intended that appeals pending in the superior court on the effective date of the legislative repeal "may continue and be completed" notwithstanding the effect of section 41 of the same bill.²²

We view this case as one saved to the Superior Court as a pending appeal, most clearly as to all issues related to the remand order.

One of Thoeni's points on appeal relates to events after the Superior Court's decision that may be sufficiently insulated from the Superior Court's jurisdiction to allow the commission to review the board's decision. Thoeni challenges the board's determination that she failed to provide responsive answers to interrogatories and

²⁰ The Supreme Court reversed the board's determination that Thoeni should forfeit benefits for the period from January 25 to February 21, 2001 for refusal to attend an employer medical examination. 151 P.3d at 1255. However, this decision does not dispose of the issue remanded by the Superior Court, which concerns forfeiture of benefits from November 21, 2001 to May 30, 2002.

²¹ AWCAC Dec. No. 010 (May 11, 2006).

²² AWCAC Dec. No. 010 at 3.

requests for production.²³ Resolution of the issue may not require intrusion into those issues saved to the Court.

Issues related to the board's dismissal of Thoeni's December 2002 claim as time-barred under AS 23.30.110(c) *may* be sufficiently discrete to allow us to hear that portion of Thoeni's appeal.²⁴ We are reluctant to suggest we do so because an alternate basis of the board's decision denying further temporary total disability compensation was a determination that Thoeni was medically stable – a determination she also challenges.²⁵ The board's determination of medical stability of the knee injury was an issue in the original appeal. While the board's decision was reversed by the Supreme Court as to the period between November 2, 2000 to January 25, 2001, but the Supreme Court, and the Superior Court, affirmed the board's decision that Thoeni was "entitled to TTD benefits for her knee injury from January 25, 2001 (the date Dr. Jaen recommended . . . surgery), *until she reaches medical stability.*"²⁶ Thus, whether the board's 2002 award (affirmed, but without a final order in the appeal to the Superior Court) has now terminated is a question that may be intertwined in the proper exercise of the Superior Court's jurisdiction.²⁷

We do not believe that the effective date clause of the 2005 legislation cut off the Superior Court's retained jurisdiction in remanded cases. There is a means to reach

²³ Appellant's Statement of Points on Appeal, February 8, 2007, at 2, number paragraph 10.

²⁴ Appellant's Statement of Points on Appeal, numbered paragraphs 3, 4, 6, and 12 appear to concern dismissal of the December 2002 claim pursuant to AS 23.30.110(c). Because no part of the board's decision concerned AS 23.30.100(c), related to notice of injury, we assume that "100(c)" in appeal point number 12 is a typographical error.

²⁵ Appellant's Statement of Points on Appeal at 2, numbered paragraphs 7, 8, and 9.

²⁶ *Thoeni I*, AWCB Dec. 02-0215 at 23-24.

²⁷ *See, e.g., Doyon Drilling, Inc. v. Whitaker*, AWCAC Dec. No. 006 (March 2, 2006).

the underlying appeal in the Superior Court without filing a new appeal.²⁸ This commission, if it decided the merits of the appeal of remanded issues, would necessarily infringe on the exercise of the Superior Court's jurisdiction and may possibly infringe on the exercise of the Superior Court's jurisdiction in other claims arising out of the same injury and facts. We must decline to act on this appeal until the Court instructs us on the extent of the Superior Court's jurisdiction.²⁹ In short, because part of this appeal clearly belongs in the Superior Court, we defer to Judge Christen's determination of what part of this appeal the Court will take up under its remand, and what part, if any, remains for us to consider, and when we may do so.³⁰

In order that the parties' rights may be preserved in the event that the commission misunderstands the law, or the Superior Court instructs the commission that it may consider some portion of this appeal, the commission will stay the effective date of dismissal of the appeal for ninety days, so as to allow the Superior Court opportunity to provide instruction to the commission.

²⁸ The exclusion of appeal to the Superior Court found in AS 23.30.129 is not a barrier to resumption of proceedings in the Superior Court because the Supreme Court recognizes two means of returning to the Superior Court: either to file a new appeal from the board's most recent order and consolidate it with the earlier appeal, or to move the Superior Court, in the first appeal, for proceedings to resume in that appeal. *See, Wade Oilfield Services v. Providence Washington*, 759 P.2d 1302, 1305 (Alaska 1988) *citing Jeffries v. Glacier State Telephone*, 604 P.2d 4, 6-7 (Alaska 1979). Thus, Thoeni may move for resumption of proceedings in her original appeal.

²⁹ The commission may decide that an appeal of a board decision on remand from the Superior Court is not within commission jurisdiction; but the commission may not delineate the Court's jurisdiction over issues in a mixed decision on remand. As we said in *Adepoju*, we have no authority to give direction to the Superior Court. AWCAC Dec. No. 010 at 10. The scope of the Superior Court's jurisdiction to hear Thoeni's appeal is not a question we may decide; therefore, we defer to the Superior Court's determination.

³⁰ If the Superior Court determines that a part of the appeal lies outside its appellate jurisdiction and therefore must be considered by this agency, the commission is willing, if so instructed by the Superior Court, to suspend its proceedings on appeal until the Superior Court proceedings are concluded, so to aid in the orderly disposition of Thoeni's appeal and promote a final resolution of her case.

Conclusion and order.

The commission concludes it does not have full jurisdiction over the appeal of Alaska Workers' Compensation Board Dec. 06-0327.

PROVIDED the commission is not otherwise instructed by the Superior Court prior to the effective date of this order, it is ORDERED that the appeal to the commission is DISMISSED effective Monday, July 30, 2007, or upon earlier notice that proceedings in *Thoeni v. Consumer Elec. Serv.*, 3AN-02-12246 Civil, have resumed in the Superior Court and the Superior Court has taken full jurisdiction of this appeal.

All other proceedings before the commission in this appeal are STAYED pending dismissal of this appeal or receipt of instructions from the Superior Court.

Date: April 30, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

Jim Robison, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final decision on the merits of this appeal, and it is not a final dispositive decision on the motion to dismiss the appeal. The commission concluded it does not have full jurisdiction over the appeal, so it has stayed the commission's order to allow the Superior Court to decide first how much of the appeal is within the court's jurisdiction. The effect of this decision is to stay, or "put a hold on," AWCAC Appeal No. 07-002 for ninety days so that the appellant may ask the superior court to resume proceedings in Superior Court Case No. 3AN-02-12246. The commission will issue a final decision and order after ninety days, or sooner if the superior court gives the commission with instructions regarding jurisdiction over the appeal.

Effective November 7, 2005 proceedings to appeal a commission decision 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 commission decision, the Supreme Court may 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 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 on Motion to Dismiss Appeal in the matter of *Mary I. Thoeni v. Consumer Electronic Services and Alaska National Insurance Co.*; AWCAC Appeal No. 07-002, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 30th day of April, 2007.

Signed

L. A. Beard, Deputy Appeals Commission Clerk

I certify that on 4/30/07 a copy of this Memorandum Decision and Order in AWCAC Appeal No. 07-002 was mailed to Thoeni (certified) and McKeever at their addresses of record, and faxed to AWCAC Appeals Clerk, WCD Director, McKeever.

Signed

L. A. Beard, Deputy Clerk