

Alaska Workers' Compensation Appeals Commission

Margaret Augustyniak,
Movant,

vs.

Carr Gottstein Foods, Safeway, Inc.,
Respondent.

Memorandum Decision and Order

Decision No. 064 November 20, 2007

AWCAC Appeal No. 07-031

AWCB Decision No. 07-0199

AWCB Case No. 200324748

Motion for Leave to Be Represented by a Non-Attorney and Motion to Allow Late-Filed Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision No. 07-0199, issued July 12, 2007, by the southcentral panel at Anchorage, Darryl Jacquot, Chair, and Janet Waldron, Member for Industry.

Appearances: Margaret Augustyniak, pro se, appellant. Robert Griffin, Griffin and Smith, for appellee, Carr Gottstein Foods, Safeway, Inc.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

This decision has been edited to conform to standards for publication.¹

By: Kristin Knudsen, Chair.

Introduction.

Margaret Augustyniak requests that the commission allow her to be represented by Mary Thoeni, to whom she has given a power of attorney, for all proceedings in her appeal to the commission. She also asks that we allow her appeal to proceed as a late-filed motion for extraordinary review. We deny the motion to allow her to be represented by a person not licensed to practice law because there is no statutory

¹ The commission issued this memorandum decision as an "Order on Motion for Leave to Be Represented by a Non-Attorney and Motion to Allow Late-Filed Motion for Extraordinary Review" on November 20, 2007, with notice that it would publish the substance of it as a memorandum decision with changes in format at a later date. The first footnote, which gave notice of future publication, has been changed, but the substantive text reflects only minor grammatical and typographical corrections.

provision parallel to AS 23.30.110(c) applicable to the commission and for the reasons stated by the Alaska Supreme Court in *Christensen v. Melinda*, 857 P.2d 345 (Alaska 1993). Notwithstanding the respondent's strong argument that Augustyniak's appeal was written, signed, and filed by her appointed attorney-in-fact, and that the procedural allowances extended by the commission to pro se litigants ought not to apply to Augustyniak because she was represented by someone who held herself out as experienced in workers' compensation procedure, we agree to allow Augustyniak to convert her appeal to a motion for extraordinary review. We direct her to complete all necessary filing for a motion for extraordinary review within ten days of this order, and we direct the parties to correct their captions to reflect the correct status of the proceeding. The appeal number does not change.

Board proceedings.

Margaret Augustyniak worked about a year for Carr Gottstein Foods Co. / Safeway, Inc., (Carrs-Safeway) ending in March 2004.² Almost a year later, she filed a report of occupational injury for a low back injury on August 25, 2003. Mary Thoeni filed a notice that she was representing the employee on July 5, 2006. Carrs-Safeway petitioned the board on February 7, 2007, to determine if Augustyniak had exercised an impermissible change of physician under AS 23.30.095(a), to determine her attending physician, in order to determine if there was a dispute between physicians sufficient to trigger a Second Independent Medical Examination under AS 23.30.095(e), and to strike all medical reports by other physicians not referred by the attending physician.

Mary Thoeni argued on Augustyniak's behalf at the hearing on the petition. She argued that the limitation on physician choice did not apply until the employee knew she had a work injury and sought coverage under the workers' compensation act, which did not occur until Augustyniak filed her notice of injury in February 2005. She also argued that changes occasioned by a physician's discharge of a patient due to failure to pay for services should not count as a voluntary change. In the course of her

² The commission makes no findings of fact. We summarize pertinent facts to place the motion in context.

argument, she cited statutes and Supreme Court cases. She made it clear she appeared as a representative, not as a witness. If Augustyniak was present at the hearing, the transcript reveals she did not speak.

The board's decision.

The board's decision was issued on July 12, 2007. The board's decision is clearly labeled "Interlocutory Decision and Order." The board decided that Augustyniak

went through a series of "self-referrals" after viewing television commercials or perusing the yellow pages, seeking additional treatment for her low back condition.

We find that any treatment sought after Dr. Duddy to be excessive changes of physicians for which the employer is not responsible. We find no need to examine the employee's motives, but conclude she did not comply with the strict requirement of AS 23.30.095(a) and 8 AAC 45.0982. We designate the employee's present attending physician to be Dr. Duddy for the employee's low back complaints.³

The board's order was similarly brief, providing simply

Under AS 23.30.095(a), the employee has exercised her one allowable change of physician to Dr. Duddy.⁴

The board did not award or deny any claim for compensation and benefits in the decision. Notably, the board did not strike medical reports from the record as requested in the petition. There was no final adjudication of Augustyniak's rights.

Proceedings in the commission.

On July 30, 2007, at 5:44 p.m., Mary Thoeni wrote to the commission clerk by e-mail asking for a form for entry of a non-attorney representative. On July 31, the clerk responded by e-mail, informing her that there is no form, and that AS 23.30.110(d) did not apply to commission proceedings. The clerk noted that the director of the division of workers' compensation may appear for an unrepresented claimant in certain cases under AS 23.30.127(a). The commission clerk wrote that

³ *Margaret Augustyniak v. Safeway Stores, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 07-0199, 7-8 (July 12, 2007) (D. Jacquot, Chair)(publ'd as Dec. No. 07-0199a).

⁴ Dec. No. 07-0199 at 8.

Augustyniak could write a motion asking the commission to allow a non-attorney representative, but that there has not been a case deciding the point, and the clerk could not advise her how the commission would decide. Mary Thoeni responded the same day, stating "I have *just filed an appeal for a client* for whom I am the representative before the AWCB. . . . I was advised by the AWCB that a non-attorney representative was permitted to practice before the Board." (Emphasis added.).

No appeal was filed in the commission on July 31, 2007. Instead, an amended notice of appeal, signed by Thoeni, was received by the commission on August 1, 2007. On August 2, 2007, the commission received a notice of appeal signed by Thoeni, with appended financial statement affidavit (signed by Augustyniak) and motion to proceed at public expense. These were returned to Thoeni, excepting the financial statement affidavit signed by Augustyniak. In the commission clerk's accompanying letter, the clerk noted that the decision appealed was a non-final order, and that the proper proceeding was a motion for extraordinary review. The clerk gave the name of a case discussing the commission's application of motions for extraordinary review and the appropriate regulations.

On August 7, 2007, Augustyniak filed her notice of appeal, with supporting documents, and a motion to be represented by a non-attorney representative. An amended notice of appeal followed on August 9, 2007, with her motion to accept late-filed appeal and/or to convert appeal to a late filed motion for extraordinary review. Carrs-Safeway opposed both motions.

Augustyniak also filed a "Limited Durable Power of Attorney" purporting to give Thoeni "authority to act in my behalf and in my stead and to bind me in all matters involving the appeal with the same authority and effect as I personally possess" on August 9, 2007. The commission clerk returned this document, pointing out it was deficient under the Alaska Statutes pertaining to powers of attorney. On August 14, 2007, Augustyniak filed a "Durable Special Power of Attorney for Appeal," appointing Thoeni

to act as indicated below in my name, place, and stead, in any way which I myself could do, if I were personally present, with

respect to the following to the full extent I am permitted by law to act through an agent:

To bind me in all matters involving the appeal of Alaska Workers' Compensation Board Decision No. 07-0199, with the same authority and effect as I personally possess. This includes, without limitation to, receiving service, appearing in my place at pre-hearing conferences or hearings, examining and cross-examining witnesses, raising and waiving issues, arguments and objections, filing briefs and motions, executing any stipulation of facts and agreeing to any settlement.

The commission first ruled on Augustyniak's request to waive filing fee and prepare the transcript at public expense, granting the appellant a waiver, and directing a transcript to be prepared at public expense on August 30, 2007. A docket notice was issued when the record was received. Because the commission clerk was unable to schedule oral argument on the remaining motions, one of which could be dispositive, before opening appellate briefs were due, the docket notice with briefing instructions was withdrawn by order on October 1, 2007. Pursuant to notice, the commission heard oral argument on the pending motions on October 19, 2007.

Arguments presented to the commission.

In open hearing in the commission's hearing room, Augustyniak appeared in person to argue her motions. Thoeni sat at the movant's table beside Augustyniak, and from time to time, Augustyniak conferred with Thoeni. Carrs-Safeway was represented by attorney Robert Griffin.

Augustyniak argued that she had not been able to obtain an attorney to represent her. She wanted to be represented by Thoeni. Augustyniak said that Thoeni did not tell her she was a lawyer, that Thoeni advised her that she (Thoeni) may make mistakes, and that Thoeni is not asking for payment. She stated that the board allowed Thoeni to represent her, so the appeals commission should be no different. She argued that "most divisions" in the Alaska Department of Labor and Workforce Development

allow non-attorney representatives,⁵ and the public assistance hearings⁶ allow non-attorney representatives. She said she relied on a board hearing officer's statement that a non-attorney representative could appear before the commission,⁷ and under *Richard*⁸ she was entitled to rely on the board's instructions.

Carrs-Safeway argued that the representation of a person before a governmental body acting in its adjudicative capacity is the practice of law. The commission is such a body. Therefore, unless there is provision by regulation or statute otherwise, a non-attorney may not represent a person before the commission. Carrs-Safeway argued this restriction protects the party from the kind of legal error this case demonstrated. The respondent asserted Thoeni failed to understand that an interlocutory order was not a final order, and as a result, improperly filed an appeal instead of a motion for extraordinary review. Even if Thoeni is only present to assist Augustyniak, the

⁵ Unemployment Insurance appeals at the first level of hearing permit non-attorney representatives by regulation: "A party to the appeal may be represented by his counsel, representative, or other agent." 8 AAC 85.153(b).

⁶ Fair hearings for initial denials of benefits or services are conducted by a number of programs within the Department of Health and Social Services, and regulations for those hearings are provided at 7 AAC.

⁷ Augustyniak's exhibit 2 is a copy of part of an e-mail exchange between Thoeni and Workers' Compensation Hearing Officer Janel Wright:

From: "Janel Wright" <janel_wright@labor.state.ak.us>
To: "M Thoeni" <thoeni@pobox.mtaonline.net>
Sent: Thursday, April 26, 2007 1:31 PM
Subject: RE: Hello

Non-attorneys can represent others before the WC Appeals Commission.

Be advised, non-attorneys cannot collect "attorneys fees"; however, litigation costs are recoverable by your client...so do with that as you so choose.

Don't worry about reading your arguments...you were the only one who knew it. You did a fabulous job.

⁸ *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963).

respondent argues, Thoeni is practicing law because she is advising Augustyniak, writing her pleadings, and telling her what to say in oral argument.

On the issue of her appeal, Augustyniak agreed that the board's order was not a final order. However, because the board's appeal instructions at the close of the order stated she had 30 days to appeal, her late filed motion for extraordinary review should be allowed. She argued it would be unjust not to do so, since the board's order precludes her from introducing evidence, which would harm her case.

Carrs-Safeway argued that Augustyniak should not be permitted the same liberal allowance given to pro se appellants because she was not unrepresented. She cannot say that she relied on the appeal instructions on the board's order, because she relied on Thoeni, who wrote, signed, and filed Augustyniak's appeal. The respondent argues Augustyniak will be able to address any error later, as the issue preserved for appeal.

Discussion.

We are asked to decide whether the appeals commission may allow parties to an appeal of a workers' compensation board decision to be represented by persons who are not attorneys. AS 23.30.110(d) specifically permits parties to a workers' compensation hearing before the board to "be represented by any person authorized in writing for that purpose." This rule has its roots in the early days of workers' compensation in this state, when labor union business agents represented claimants and insurance adjusters represented employers. Members of this commission, in the course of their service on the board, have heard cases in which claimants and employers are represented by persons who are not attorneys, including union agents, law student interns, adjusters, spouses, friends, employees, and representatives of community organizations. The board's regulation, 8 AAC 45.178, regularized this practice by providing standards for the notice of appearance if the person is not licensed to practice law within the State of Alaska.⁹

⁹ 8 AAC 45.178 provides:

(a) A person who seeks to represent a party in a matter pending before the board shall file a written notice of appearance with

However, AS 23.30.110 concerns hearings on a claim before the board. It does not concern appeals to the commission. The commission statutes and regulations clearly permit attorneys to represent parties to an appeal and to be compensated for their services, but are silent as to non-attorney representatives. There is no provision in AS 23.30 providing an appellant the right to be represented by "any person" before the commission, although the commission is authorized to award an attorney fee to a successful party under AS 23.30.008(d). Similarly, 8 AAC 45 contains the regulations applicable to the board. The commission's regulations are found at 8 AAC 57 and contain no provision for non-attorney representation in appeals, although motions for attorney fees are regulated at 8 AAC 57.260. While under 8 AAC 47.270 the commission may order "procedures that differ from" the regulations if strict adherence to the regulations would work injustice, we cannot say that this authority permits the

the board, and shall serve a copy of the notice upon all parties. The notice of appearance must include the representative's name, address, and phone number and must specify whether the representative is an attorney licensed to practice law within the State of Alaska. If the person who seeks to represent a party is not licensed to practice law within the State of Alaska, the notice of appearance must be accompanied by

(1) the employee's written authorization if the person represents the employee; or

(2) the employer's written authorization unless the person seeking to represent the employer is an employee of

(A) the employer's insurer; or

(B) the adjusting company handling the claim for the employer's insurer.

(b) A representative of a party may withdraw an appearance by filing with the board a written notice of withdrawal and by serving the notice upon all parties. The withdrawal becomes effective upon receipt by the board.

commission to allow conduct that the regulations are silent upon,¹⁰ if the conduct is otherwise prohibited by law.

In *Christensen v. Melinda*,¹¹ the Alaska Supreme Court rejected the argument that a power of attorney permitted a person who was not an attorney to represent a pro se claimant in small claims court. In that case the Court held that the unlicensed, in-court representation of another falls within the prohibition of AS 08.08.210(a) barring the unlicensed practice of law.¹² The court held that although Alaska Bar Rule 63 literally applies only to the criminal offense¹³ of the unlicensed practice of law, that rule “necessarily defines the conduct that, at a minimum, constitutes the unlicensed practice of law for non-criminal purposes.”¹⁴

Alaska Bar Rule 63(b) defines the following conduct as the practice of law: “either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii), for compensation, providing advice or preparing documents for another which affect legal rights or duties.” This commission is a governmental body, established within the Department of Labor and Workforce Development, to adjudicate appeals from Alaska Workers’ Compensation Board decisions under the Alaska Workers’ Compensation Act.¹⁵ Representatives before the commission argue the appeal on behalf of appellants and submit pleadings, including hearing briefs and motions. Based on the same reasoning the Supreme Court applied in *Christensen*, we conclude that representing another in an

¹⁰ We note that the Court of Appeals did not recognize a constitutional right to lay representation in criminal cases, although it held a magistrate was not precluded from exercising discretion to permit lay representation in limited circumstances. *Skuse v. State*, 714 P.2d 368 (Alaska Ct. App. 1986).

¹¹ 857 P.2d 345 (Alaska 1993).

¹² 857 P.2d 345, 347.

¹³ AS 08.08.230(a).

¹⁴ 857 P.2d 345, 346 n. 4.

¹⁵ AS 23.30.007.

appeal to the commission, and submitting pleadings on behalf of another to the commission, even without compensation,¹⁶ constitutes the practice of law.

AS 08.08.210(a) states that “a person may not engage in the practice of law in the state unless the person is licensed to practice law in Alaska and is an active member of the Alaska Bar.” In AS 23.30.110(d), the legislature exempted board hearings from the governmental bodies operating in adjudicative capacities to which AS 08.08.210(a) applies. In view of the usually informal, summary, and relatively simple procedure exercised at board hearings, the legislative mandate that the compensation system be efficient as well as fair and deliver benefits at reasonable cost, the board’s custom of participating in questioning parties, and its obligation to “best ascertain the rights of the parties,” we believe that the legislature’s exemption of board hearings from AS 08.08.210(a) has a sound historical and rational basis. However, the legislature’s decision not to extend that exemption to the commission is also rational.

At the board level, a claimant may present a disorganized case. Often the record in such a case contains a mass of evidence that bears only tangentially on the legal issues in the claim when it is heard. The pre-hearing conference process works to winnow the issues for hearing, so that the claimant’s case is better focused and prepared, evidence is fully developed, and the claimant understands what questions will be decided. In the hearing itself, the board may question the claimant, so that again the positions of the parties and questions to be decided are clearly understood and evidence brought out. Presentation of evidence is informal and often guided by the board’s designated chair. Any assistance provided by a non-attorney representative is not subject to an order of payment under AS 23.30.145.¹⁷

¹⁶ The parenthetical clause, “for compensation,” applies only to subsection (b)(ii).

¹⁷ See 1998 Alaska Op. of the Atty Gen. Op. 1998 WL 1108870, (April 28, 1998; File No. 661-97-0326) at 2 (“The board cannot therefore award fees to anyone other than a licensed attorney.”). The board’s regulation at 8 AAC 45.180(f), permits costs for the services of a paralegal or law clerk to be awarded within an attorney fee award, but only if the paralegal or law clerk is employed by an attorney licensed in this

However, an appeal to the commission is a different matter. The commission does not resolve factual disputes or decide who is telling the truth. The commission reviews the board's decision for errors of law, including whether there was substantial evidence in the record to support the board's findings of fact. The task of an appellant is to explain in writing [and in oral argument] why the board's decision contains legal errors, why those legal errors affect the outcome, and what the commission should do in response to the appeal. In some cases, it is not difficult to identify and explain the board's errors; in others, it is legally complex. In all cases the commission process is more formal, structured, and dependent on written argument than the board's hearing.

The appeals commission works hard to make the appeal process accessible to self-represented litigants. We give instructions on the appeal process, inform litigants of deficiencies, provide opportunities to correct defaults, and make allowances for their need for more time. We have said

So long as the commission is able to discern the pro se litigant's basic arguments on appeal, and the opposing party is able to discern and respond to them, the commission considers the brief adequate. We have been impressed, as members of the board and as members of the commission, by the sophistication and coherence of arguments advanced by some pro se litigants. We do not regard an argument as less weighty merely because it was prepared by a person not learned in law or proficient in English grammar and spelling. The commission may exercise its discretion to require oral argument on an appeal involving a pro se litigant, even if oral argument is not requested by the parties, in order to further question the parties, draw out the nuances of their arguments and guide the pro se litigant in presenting an argument.¹⁸

If the appellant is self-represented, responsibility for the appeal still rests with the appellant, notwithstanding the information provided by the commission. The appellant must make choices about how to proceed, what points to appeal, and what

or another state, did the work under the supervision of a licensed attorney, and the work was of not a clerical nature.

¹⁸ *Khan v. Adams and Assoc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 057, 6 (September 28, 2007).

arguments to present, all of which affect the appellant's legal rights. The appellant has a right to be represented in commission proceedings,¹⁹ but the legislature did not extend that to a right to be represented by "any person" before the commission. When an appellant comes before the commission, the appellant has already lost a claim or right before the board. If the appellant's representative makes erroneous or careless decisions for an appellant, or an appellant makes them in reliance on a representative's uninformed advice, the appellant's rights may be lost beyond recovery. These are sound reasons why, at the commission level, the specific legislative allowance for non-attorney representation before the board was not extended to the commission.²⁰ In the absence of a specific statute exempting commission appeals, the general bar in AS 08.08.210 against non-attorney representation before governmental adjudicative bodies applies to the commission.²¹

Augustyniak would like Thoeni to represent her, but we see no familial relationship between Thoeni and Augustyniak, as between spouses or parents and children, evincing an obligation of care and shared risks and resources. Instead, Thoeni described Augustyniak as her "client," which suggests that Thoeni regards herself as a service provider and Augustyniak as the service consumer, instead of the principal-agent relationship created by a power of attorney. If Thoeni acts to Augustyniak's disadvantage, through ignorance or carelessness, Augustyniak has no ready source of

¹⁹ The right to be represented does not mean that the commission must provide a representative or suspend the appeal until a representative is found. *Id.* at 4.

²⁰ AS 23.30.127(a) allows the director of the division of workers' compensation to file an appeal to obtain a ruling if a party is not represented by counsel and the board's decision and order concerns an unsettled question of law. The decision to file an appeal in such cases, or to intervene in appeals, is within the director's discretion.

²¹ Augustyniak argued that the commission is bound by the e-mail opinion casually offered by Workers' Compensation Hearing Officer Janel Wright. We disagree. We doubt Ms. Wright intended her e-mail to be publicly quoted as an authoritative statement of the law rather than a personal expression of her thoughts. Individual hearing officers employed by the workers' compensation division do not have the statutory authority to bind the commission to a particular interpretation of the statutes.

recovery for the wrong done to her. Augustyniak stated in oral argument that she had agreed she “would not hold [Thoeni] liable” but we are not persuaded that Augustyniak understands the nature of obligations assumed by agents or by legal representatives.

Although Thoeni represented Augustyniak before the board, she is not subject to the disciplinary sanctions facing attorneys. No regulatory body exists to investigate Thoeni’s conduct if she does not fully advise Augustyniak of all the potential impacts of an appeal or arguments made or waived. The commission observed this is not a remote possibility; in oral argument Augustyniak revealed that Thoeni had not informed her that an appellant who files a frivolous or bad faith appeal may be liable for attorney fees. Although the commission recognizes the difficulty Augustyniak faced when trying to find representation, we are not convinced that the commission would “work injustice” if it did not permit Augustyniak to yield control of her appeal to Thoeni and allow Thoeni to waive her arguments, bind her to stipulations, and settle her appeal, as she purports to do in the “Durable Special Power of Attorney” she signed.

On the other hand, we will allow Thoeni to assist Augustyniak. Our concerns regarding non-attorney representation are mitigated if Augustyniak remains an active, controlling participant in her appeal, and is responsible for her written and oral representations to the commission. We note that the regulations of the Office of Administrative Hearings, while confining *representation* to attorneys, allow parties to be *assisted* by a person who is not an attorney.²² Assistance to self-represented parties

²² 2 AAC 64.160 provides as follows:

(a) A party to an administrative hearing may be represented by an attorney or may be self-represented. An agency or entity is self-represented when acting through an authorized employee or officer. The administrative law judge may allow a self-represented party to be assisted by a person who is not an attorney and may impose reasonable limits on participation by the assistant.

(b) A party represented by an attorney in the administrative hearing shall file, or cause the attorney to file, and serve on the other parties a document that

(1) identifies the attorney; and

may well advance the prompt, fair, and just disposition of appeals. The commission may exercise its discretion to permit Thoeni to assist Augustyniak in her appeal to the commission so long as the assistance is unpaid, is subject to limitations imposed by the commission, and does not approach representation.

We impose the following *minimum* limits on Thoeni's assistance to Augustyniak. Thoeni may inform Augustyniak of the rules, procedures, regulations, statutes and decisions respecting workers' compensation that may be applicable to her appeal and provide copies of them to her. She may help Augustyniak complete forms and prepare pleadings and correspondence, but all pleadings, correspondence, and forms must be signed and dated by Augustyniak. Pleadings must include a verification that Augustyniak read and understood what she signed. Thoeni may help Augustyniak assemble records, make copies, and type documents for her. Thoeni may help Augustyniak prepare for oral argument, sit at the counsel table with her and provide support, but she may not address the commission at oral argument.²³ If Augustyniak appears by telephone and wishes Thoeni to assist her, then Thoeni must be available telephonically as well. Thoeni may not pay filing or transcript fees or receive service of process for Augustyniak.²⁴ Thoeni may not correspond with other parties or the commission on her behalf respecting the appeal, or represent, speak for, communicate,

(2) provides the address, telephone number, facsimile number, and electronic mail address for the attorney, and

(A) the Alaska Bar Association number of the attorney; or

(B) if the attorney is not licensed to practice law in active status in this state, the name of each state in which the attorney is licensed to practice law in active status.

²³ If the assistant is the spouse or parent of the self-represented party, the commission may, in its discretion, allow the spouse or parent to speak to the commission in oral argument, provided the party is present and asks the commission to allow the parent or spouse to speak.

²⁴ Courtesy copies of commission notices will be sent to Thoeni.

or act on behalf of Augustyniak in regard to the appeal.²⁵ If Thoeni ceases to assist Augustyniak, she must promptly notify Augustyniak, the opposing party and the commission in writing. If it appears to the commission that Thoeni's assistance is (1) not in the interests of justice, (2) given in a manner inconsistent with the rights of all parties and the orderly and prompt resolution of Augustyniak's appeal, or, (3) contrary to the above stated minimum limits, the commission will withdraw its permission for Thoeni's recognized status as an assistant in Augustyniak's appeal.

Finally, we turn to the question of allowing the appeal to be converted to a late-filed motion for extraordinary review. Augustyniak conceded that the decision she appealed was a non-final interlocutory decision, and that a motion for extraordinary review is what should have been filed. Augustyniak conceded she did not act in a timely fashion to file the motion, but she alleges she was confused by the board's "appeal procedures" in its written decision. Carrs-Safeway opposes allowing "confusion" as an excuse, because Thoeni represented Augustyniak when the decision was issued. We agree that Thoeni should have been aware of the commission's regulations as she had undertaken the obligation to act as Augustyniak's representative. However, we have held that Thoeni may not represent Augustyniak on appeal. We will allow the appeal to be converted to a late-filed motion for extraordinary review because Augustyniak relied on Thoeni's actions on her behalf in the expectation they would be done properly. We agree that to enforce our regulations strictly in this case would work injustice and to allow the late-filed motion will advance the resolution of this matter. We caution Augustyniak that allowing her appeal to be converted to a motion for extraordinary review is not an indication that the commission will, or will not, take up extraordinary review of Alaska Workers' Compensation Board Decision No. 07-0199.

²⁵ This decision does not affect Thoeni's continuing duties as Augustyniak's lay representative before the board. In addition, while Thoeni may be present at commission directed telephone conferences with Augustyniak; she may not represent Augustyniak in Augustyniak's absence.

Conclusion and order.

We have concluded that a person who is not an attorney may not represent an appellant before the commission under the authority of a "power of attorney." Because representation of a person before a governmental body acting in its adjudicative capacity is the practice of law, and no statutory or regulatory authority exists permitting such representation by a person who is not an attorney before the commission, we conclude that AS 08.08.210 bars representation of appellants by persons who are not attorneys before the commission. However, within certain limits, a self-represented appellant may be assisted by a person who is not an attorney. Therefore, we ORDER that Augustyniak may be assisted by Thoeni within the minimum limits set out above.

For the reasons set out above, we further ORDER that Augustyniak shall complete all remaining requirements for a motion for extraordinary review by 5:00 p.m. November 29, 2007. The appellee's response to the motion for extraordinary review shall be filed in the commission by 5:00 p.m. December 6, 2007. The commission will accept fax or e-mail filing as provided by regulation. The parties are directed to conform their captions to reflect the correct status of this proceeding.

Date: Nov. 20, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final decision on the merits of this appeal. The effect of this decision is to allow Ms. Augustyniak (the movant) to convert her appeal from a non-final interlocutory board order to a motion for extraordinary review of the board's order. This decision permits the movant to proceed with assistance by Ms. Thoeni, but does not allow her to be represented by Ms. Thoeni. This decision is not a final decision on Ms. Augustyniak's claim, which has not been decided by the board.

Effective November 7, 2005 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. AS 23.30.129. Because this is not a final commission decision on an appeal of a final board order on a claim, 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 Order on Motion for Leave to Be Represented by a Non-Attorney and Motion to Allow Late-Filed Motion for Extraordinary Review in AWCAC Appeal No. 07-031, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 20th day of November, 2007.

Signed

L. Beard, Deputy Appeals Commission Clerk

Certificate of Service

I certify that on 11/20/07 a copy of this Order in AWCAC Appeal No. 07-031 was mailed to Augustyniak (certified), Thoeni (courtesy copy) and Griffin at their addresses of record, and faxed to AWCAC Appeals Clerk, WCD Director, and Griffin.

Signed _____ 11/20/07
L. Beard, Deputy Clerk Date